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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 91

JOSEPH ARTHUR ZICARELLI,

Appellant,

vs.

THE NEW JERSEY STATE COMMISSION OF INVESTIGATION,

Appellee.

On Appeal from the Supreme Court of New Jersey

BRIEF OF APPELLEE, NEW JERSEY STATE COMMISSION OF INVESTIGATION

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Questions Presented

Appellee agrees with appellant's formulation of questions (1) and (2). Question three however, should be amended to read (3) Whether prosecution outside the United States is relevant in determining the validity of

a Fifth Amendment claim of self-incrimination. Further whether an individual who has no real or substantial fear of foreign prosecution may assert such claim.

Statement of Case

Appellee agrees with Appellant's statement of the case. *Appellant's Brief,* at 4-8.

Summary of Argument

Appellant's constitutional privilege against self-incrimination has been fully protected by the immunity granted him under N.J.S.A. 52:9M-17, which provides for immunity from the use of compelled answers or evidence derived therefrom, and his refusal to answer questions under this grant of immunity justified his incarceration for civil contempt until such time as he purges his contempt by answering them. While prior decisions of this Court, e.g. *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892); *Brown* v. *Walker,* 161 U. S. 591 (1896) have affirmed the sufficiency of transactional immunity to replace the Fifth Amendment privilege against self-incrimination, the question of the sufficiency of "use plus fruits" immunity has never been before this Court, and therefore such an immunity configuration has never been held constitutionally infirm. *Malloy* v. *Hogan,* 378 U. S. 1 (1964) held that the "same standard" must determine whether a witness' silence in either federal or state proceedings is justified. *Murphy* v. *Waterfront Commission,* 378 U. S. 52 (1964), decided on the same day as *Malloy,* held that the immunity which the Fifth Amendment *itself* requires, absent an immunity grant, is "use plus fruits" by reading *Counselman, supra,* as so holding, and then applying the

Malloy "same standard" test to the facts of the case. Thus, whether the immunity granted affects a single jurisdiction or multiple jurisdictions, the question is the same, "What immunity the Fifth Amendment itself requires in exchange for compulsion to answer." *In re Zicarelli,* 55 N. J. 249 (1970). The language of the Fifth Amendment compels the "use plus fruits" or exclusionary rule standard of immunity. Since a person who invokes his privilege against self-incrimination can nonetheless be prosecuted on evidence independent of his testimony if his right to silence is honored, and since he thereby gains all the protection to which he is entitled under the Fifth Amendment, it follows that a person granted immunity (which *replaces* the Fifth Amendment Privilege) can not be afforded any greater protection under the Fifth Amendment than the person whose claim to silence is respected. Transactional immunity gives a person compelled to testify greater protection under the Fifth Amendment than a person who has refused to testify at all, since the transactional standard absolutely precludes any future prosecution, while the person refusing to testify may nonetheless be prosecuted on the basis of independent evidence. The transactional standard thus gives a "gratuity to crime", *Heike* v. *United States,* 227 U. S. 131 (1913), rather than a fair "exchange". This fact may, in turn, present a constitutional question under the "equal protection" clause of the Fourteenth Amendment, because a class of people, i.e. those who choose to remain silent, are being arbitrarily discriminated against. Under "use plus fruits" immunity there is no such problem because both the testifying witness and the non-testifying witness receive equal protection under the Fifth Amendment.

Moreover, "use plus fruits" immunity advances an exclusionary rule which suffices to replace the Fifth Amend-

ment Privilege. The earlier cases, such as *Counselman, supra,* and *Brown, supra,* purporting to set down the transactional immunity standard, were all decided at a time when there was no constitutional exclusionary rule or "fruit of the poisonous tree" doctrine to provide sufficient protection under the Fifth Amendment. Those cases then took an overly protective approach to provide protection in the only way then feasible, i.e. absolutely. But with the decisions in *Weeks* v. *United States,* 232 U. S. 383 (1914) laying down the exclusionary rule, and *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920), advancing the "fruit of poisonous tree" doctrine, new judicial tools were provided to insure protection of precious individual constitutional rights, while at the same time protecting the interest of the government. To date, this exclusionary rule has been effectively used in the area of the Fourth Amendment, *Weeks, supra,* and *Mapp* v. *Ohio,* 367 U. S. 643 (1961) (applying the *Weeks* doctrine against the states) and the Sixth Amendment, *Massiah* v. *United States,* 377 U. S. 201 (1964) and *McLeod* v. *Ohio,* 381 U. S. 356 (1965) (applying the *Massiah* rule against the states). There is no reason why a similar approach and an analogous rule cannot be court-developed in the area of Fifth Amendment protection. In fact, this Court has indicated a willingness to impose use restrictions in the Fifth Amendment area, saying that completely barring future prosecution would "increase to an intolerable degree interference with the public interest in having the guilty brought to book." *Blue* v. *United States,* 384 U. S. 251 (1966). In cases involving federal regulation of potentially incriminating areas of conduct, this Court has found the concept of use restrictions placed on information so gathered "in principle an attractive and apparently practical resolution of the . . . problem . . ."

Marchetti v. *United States*, 390 U. S. 39 (1968). And since the government has the heavy burden of showing absence of taint in any prosecution touching matters testified to under immunity, and since courts have tools available to make this burden, in practical effect, as heavy as they deem necessary to be commensurate with the protection afforded by the Fifth Amendment, the individual will be fully protected under the exclusionary rule standard.

In addition, practical difficulties inhere in the transactional immunity test. Since only prosecutions based upon transactions connected "in a substantial way" with testimony given under transactional immunity are barred, *Heike* v. *United States, supra*, the defendant may have enormous pragmatic problems in showing that this relationship exists. The need for defendants to make such showings will also increase the number of court hearings and further congest already crowded court dockets. Further, greater amounts of testimony will be given under "use plus fruits" immunity, and it will be more probative than testimony given under transactional immunity. This best balances the public's need for every man's evidence with the individual's right not to be a witness against himself. Furthermore, respect for law is fostered by a rule under which the government fairly "exchanges" protection against "use plus fruits" for compelled testimony, as opposed to a wastefully broad rule whereby the government gives a "gratuity to crime" by, in effect, condemning action on the one hand, and completely pardoning it on the other hand. In addition, the "use plus fruits" concept avoids possible conflict with the Sixth Amendment rights of "confrontation" and "compulsory process", whereas the transactional standard increases the likelihood of such conflicts. Finally, as this Court

well knows, the Congress, in response to a four year federal study, has recently passed such a statute to replace virtually all heretofore existing federal immunity statutes.

The requirement for responsive answers and evidence is constitutional as it merely requires that which the witness "in good faith" believes the government demanded. Moreover, this Court's own test as to what is self-incriminatory was formulated by using the language "responsive answers", *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951); *Malloy* v. *Hogan*, 378 U. S. 1 (1964). There can be no better assurance of the constitutionality of such a term than its appearance in the very test this Court promulgated with respect to self-incrimination. Thus, the lower court's ruling that the demand for responsive answers poses no constitutional difficulty is obviously correct.

Fear of foreign, i.e. extra-United States prosecution is not relevant in determining the validity of a Fifth Amendment claim of self-incrimination *Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964); *In re Parker*, 411 F. 2d 1067 (10th Cir. 1969). Furthermore, appellant made no showing whatever in the Court below that his fear of foreign prosecution was real. In fact he has answered no questions at all and admits that no questions were ever asked which related to possible foreign criminality. On the contrary then, all the evidence indicates this fear is unreal and imaginary, *Brown* v. *Walker*, *supra*. Moreover, apprehension of prosecution in Canada is misplaced. That country long ago adopted, in effect, a *Murphy* rule which fully protects any person compelled to incriminate himself, even outside of Canada, by barring use of such testimony in any Canadian proceeding. *Prosko* v. *Rex*, 63 S.C.R. 226 (Sup. Ct. Canada 1926).

Therefore, even if fear of foreign prosecution is relevant and real, which it is not, appellant runs no risk of foreign prosecution in Canada. Thus appellant's contention that his claim to silence should have been honored is totally without merit.

POINT I

Appellant's incarceration for civil contempt pursuant to an immunity statute which grants immunity from the subsequent use of compelled testimony and any fruits thereof, but which fails to grant absolute immunity from prosecution, affords a constitutional protection adequate to warrant the compulsion of his testimony.

A. Prior decisions of this Court have reaffirmed the sufficiency of transactional immunity to replace the Fifth Amendment. However, this Court has never tested the constitutional sufficiency of a "use plus fruits" immunity statute, and therefore has never held such a statute constitutionally infirm.

(1) *Pre-Murphy v. Waterfront Commission of New York Harbor*, 378 U. S. 52 (1964).

The first case to deal with a federal witness immunity statute was *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892). In that case Counselman, a grain shipper, was subpoenaed as a witness to appear before a federal grand jury to answer certain questions pertaining to alleged violations of the Interstate Commerce Act. He refused to answer on the basis of self-incrimination. After being directed to answer by the court, and persisting in his refusal, he was adjudged in contempt. Rev. Stat. §860, 15 Stat. 37 (1868) provided as follows:

> "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

After rejecting the Government's contention that the Fifth Amendment privilege was inapplicable to a witness before a grand jury, the Court also overruled the claim that §860 gave protection adequate to warrant the compulsion of incriminating evidence. While the statute forbade use of the compelled testimony itself in any court of the United States,

> "[i]t could not, and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

The protection of Rev. Stat. §860 was therefore "not co-extensive with the constitutional provision." 142 U. S. at 564-565.

This holding could and should have ended the case. However, the Justices felt constrained to review prior decisions and stated at 142 U. S. at 585:

> "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

After all this the opinion closed on the more subdued theme earlier enunciated:

> "Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom from a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party." Ibid., at 586.

Counselman advanced several important propositions. It held, for example, that the protection of the Fifth Amendment extends to a witness called to testify before a grand jury, and is not limited to cases of criminal prosecution against the witness himself. As the court stated:

> "The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard." 142 U. S. at 562.

Further, the case held that to be valid, a statute must afford protection *co-extensive* with the Fifth Amendment, Id. at 565, thus paving the way for future legislative enactments which could be construed as co-extensive with the rights afforded by the Fifth Amendment. Finally, and most specifically, the Court held that §860, a mere use immunity statute, which could not protect a person against future prosecution based on leads derived from his compelled testimony, was not sufficient to replace the Fifth Amendment.

Faced with two criticisms of Rev. Stat. §860, one that it could not protect against prosecution based on leads derived from compelled testimony, the other that it did not afford absolute immunity against future prosecution, the Congress decided to play it safe. In 1893, it passed, in response to *Counselman, supra,* a more broadly phrased "transactional" immunity statute which provided:

> "But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise . . ." Act of February 11, 1893, c. 83, 27 Stat. 443 (1893).

Shortly thereafter, the constitutionality of this enactment was challenged. In *Brown* v. *Walker,* 161 U. S. 591 (1896), an auditor of a railway company was called before a grand jury probing alleged violations of interstate commerce regulations. Brown was questioned, refused to answer on the basis of self-incrimination, and was then ordered to answer by the court. He again refused to answer and was held in contempt. The Court affirmed Brown's contempt citation and sustained the constitution-

ality of the "transactional" immunity statute before it, citing *Counselman, supra,* as its primary authority. Id., at 594-595. In *Brown, supra,* the sole issue before the court was the validity of a *transactional* immunity statute. In sustaining that statute the court merely decided that transactional immunity was sufficient. The decision therefore did not hold that *only* transactional immunity would suffice to achieve this end, but rather that it did in fact suffice. Thus, the holding in *Brown* never reached the precise issue presented in this appeal.

The next case to deal with this problem was *Hale* v. *Henkel,* 201 U. S. 43 (1906). Here again the court was asked to decide whether transactional immunity was sufficient and additionally whether the threat of prosecution in a foreign jurisdiction undermined any grant of federal immunity. Citing *Brown, supra,* the court disposed of both issues in favor of the grant of immunity. The decision in *Hale* in no way intimated that a lesser immunity grant would not suffice to replace the Fifth Amendment. It merely reiterated the then established rule that transactional immunity did suffice to achieve that end.

All other cases cited by appellant in support of the proposition that the Fifth Amendment *requires* nothing less than transactional immunity suffer from similar deficiencies. *McCarthy* v. *Arndstein,* 266 U. S. 34 (1924), for example, stands for the proposition that the constitutional privilege against self-incrimination applies to civil as well as to criminal proceedings, and more specifically that the privilege was applicable to an examination of a bankrupt and his wife under the then existing bankruptcy act for the purpose of obtaining possession of property belonging to his estate. Id., at 39-41. *United States* v. *Murdock,* 284 U. S. 141 (1931) held that "immunity

against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him. . . ." Id. at 149. In *Smith* v. *United States,* 337 U. S. 137 (1949), the Court dealt with a transactional immunity statute which, by its terms, required a witness to claim his privilege rather than granting him immunity automatically. The issue before the Court was whether a certain response by the witness to a question put to him by the government constituted a waiver of a previous definite claim of general privilege against self-incrimination. Ibid., at 150-152. Again, in *Smith,* the sufficiency of a "use plus fruits" statute was not presented, and its holding in no way reflected an opinion as to that question. In *United States* v. *Bryan,* 339 U. S. 323 (1950), a witness called before a House Committee willfully and deliberately failed to produce books and records called for in subpoenas issued by the Committee on the grounds that a quorum of the Committee was not present at the time the documents were to be produced. She further claimed that any testimony she did give could not subsequently be read to a jury trying her for contempt, because the immunity statute involved protected her against future use of her testimony in any criminal proceeding. The immunity involved was a mere "use" immunity, 18 U. S. C. §3486, similar to the statute struck down as insufficient in *Counselman.* The question of the necessary scope of immunity to be co-extensive with the Fifth Amendment was not raised by either issue in the case, and therefore was not before the Court. And, once again, the Court's holding in *Bryan* in no way reflected an opinion as to that issue.

More recently, in *Ullman* v. *United States,* 350 U. S. 422 (1956), the Court had occasion to reconsider the con-

stitutionality of a transactional immunity statute. The Immunity Act of 1954, 68 Stat. 745, 18 U. S. C. (Supp. II), §3486, 18 U. S. C. A. §3486 provided in pertinent part:

> "But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding . . ."

The Court explicitly stated that the statute before it was "a similar Act" to the one considered in *Brown* v. *Walker, supra.* Id. at 429. In upholding the constitutionality of the statute before it, primarily on the basis of *Brown,* the Court once again reiterated the sufficiency of transactional immunity to replace the Fifth Amendment privilege. And again, since *Brown* and *Ullmann* upheld the constitutionality of transactional immunity statutes, these opinions should be read as supporting that proposition, and only that proposition. Further, appellee Commission agrees with Mr. Justice Frankfurter's statement in *Ullmann.* Id at 438:

> "The 1893 statute [granting transactional immunity] has become part of our constitutional fabric."

But agreeing with this conclusion in no way compels the conclusion appellant extracts from it, i.e. that transactional immunity is the *only* type which suffices to supplant the Fifth Amendment privilege against self-incrimination. It is possible, as will be shown throughout this brief, that a lesser form of immunity will fully suffice to

achieve that end. *United States* v. *Monia,* 317 U. S. 424 (1943) offers only little more. In *Monia* the issue before the Court was whether a transactional immunity statute was "automatic" in its operation or whether the witness had to claim his privilege under the statute. This question obviously did not raise the issue of the minimum scope necessary for an immunity statute to be valid, the issue is the instant case.

It is clear therefore that cases cited by Appellant in support of the necessity of transactional immunity do not, upon close analysis, support that view at all. Furthermore, it is a cardinal rule of constitutional adjudication that courts will not formulate a rule of constitutional law broader than is absolutely necessary and required by the precise facts to which it is to be applied. *Harmon* v. *Brucknер,* 355 U. S. 579 (1958); *Sweatt* v. *Painter,* 339 U. S. 629 (1950); *Rescue Army* v. *Municipal Court,* 331 U. S. 549 (1947); *Texas* v. *Grundstrom,* 404 F. 2d 644 (5th Cir., 1968). It is respectfully submitted that the cases discussed thus far should be read in this salutory light. And a careful reading of each leads to the ineluctable conclusion that as of the time *Ullmann, supra,* was decided, the precise issue drawn in the instant case was neither ever before this honorable Court nor ever definitively answered by it.

(2) *Murphy* v. *Waterfront Commission of N. Y. Harbor and Beyond.*

As stated before, the specific holding in *Counselman* v. *Hitchcock, supra,* was that a mere "use" immunity statute alone was not sufficient to replace the Fifth Amendment privilege (Appellee's Brief, at 10). The reason for that holding, however, is not facially apparent. On the one

hand, the holding could have been posited on the theory that, since the immunity statute "could not prevent the obtaining and use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion and on which he could be convicted . . ." 142 U. S. at 564-565, it was constitutionally defective. On the other hand, the holding could also have been predicated on the theory that, in any event, ". . . a statutory enactment, to be valid, must afford absolute immunity against future prosecution. . . ." 142 U. S. at 585-586. Subsequent cases up to *Ullmann, supra,* dealing with the sufficiency of grants of immunity read *Counselman* as espousing the latter, rather than the former theory. However, in *Malloy* v. *Hogan,* 378 U. S. 1 (1964), the Court held that "the same standards must determine whether [a witness'] silence in either federal or state proceedings is justified." Ibid., at 11, and applied the Fifth Amendment privilege against self-incrimination against the states through the Fourteenth Amendment "due process" clause. On the same day, in *Murphy* v. *Waterfront Commission of New York Harbor,* 378 U. S. 52 (1964), the Court was faced with the problem of what protection the Fifth Amendment afforded a state witness who was granted transactional immunity from state prosecution against possible federal incrimination. As the Court phrased the question:

> "Since a grant of immunity is valid only if it is co-extensive with the scope of the privilege against self-incrimination, *Counselman* v. *Hitchock,* 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110, we must now decide the fundamental constitutional question of whether, absent as immunity provision, one jurisdiction in our federal structure may compel a witness to give testimony which might incriminate

him under the laws of another jurisdiction." 378 U. S. at 54.

In answer to this question the Court maintained:

> "We hold that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." 378 U. S. at 77-78.

The Court then went on to ". . . decide what effect this holding has on existing state immunity legislation. . . ."

378 U. S. at 78.

There followed a discussion as to the holding in *Counselman, supra.* The Court conspicuously cited the "use plus fruits" language from *Counselman,* and avoided the broader absolute or transactional language. Thus, the *Murphy* Court said of *Counselman, supra,* that:

> ". . . the Court upheld appellant's refusal to answer on the ground that the statute:
>
> 'could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. * * *' id., 142 U. S. at 564, 12 S. Ct., at 198,

that it:

> 'could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted. * * *' ibid.,

and that it:

> 'affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party.' Id., 142 U. S., at 586, 12 S. Ct., at 206." 378 U. S. at 78-79.

The Court then went on to elaborate on the holding quoted above, asserting:

> ". . . we hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." 378 U. S. at 79.

The Court added this significant footnote to that holding:

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters

> related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 378 U. S. at 79 n. 18.

From the point of view of hindsight, in applying the holding of *Counselman, supra,* to the holding that the privilege against self-incrimination protects a state witness against federal prosecution, and that the "same standard" must determine whether silence in either a federal or state proceeding is justified, *Malloy* v. *Hogan, supra,* at 11, the *Murphy* court had several ways in which to harmonize its holding with *Counselman.* Essentially, these alternatives were three:

(1) The Court could read *Counselman* as mandating transactional immunity in both the compelling and non-compelling jurisdiction and applying this broad standard to the facts presented.

(2) It could read *Counselman* as mandating transactional immunity within the compelling jurisdiction, while asserting that, for reasons of federalism, the non-compelling jurisdiction need only be precluded from use of compelled testimony or its fruits, and

(3) It could read *Counselman* as mandating a minimum of "use-fruits" immunity in both the compelling and non-compelling jurisdictions, and applying this "same standard" to the facts presented.

The Court peremptorially rejected the first choice as untenable in view of law enforcement prerogatives. As Mr. Justice White said in his concurring opinion:

> "But such a rule [of transactional immunity] would invalidate the immunity statutes of the 50

> States since the States are without authority to confer immunity from federal prosecutions and would thereby cut deeply and significantly into traditional and important areas of state authority and responsibility in our federal system." 378 U. S. at 93.

As to the second choice, the position advanced by appellant, namely *Murphy, supra,* held that only "use-fruits" immunity was necessary in a cross-jurisdiction situation "out of considerations of federalism" (*Appellant's* Brief, at 19), it seems clear that for *Murphy* to have so read *Counselman, supra,* necessitates the postulation of a theory other than the Fifth Amendment on which to support of this elusive concept of "federalism." For the Fifth Amendment certainly does not by its own terms, support it, and *Malloy, supra,* does not compel it. Appellant contends that under this theory, *Murphy,* read with *Malloy, supra,* ". . . broadened rather than restricted the protection of the Fifth Amendment's privilege against self-incrimination." *Appellant's Brief* at 18. It is true that *Malloy, supra,* broadened the application of the Fifth Amendment privilege against self-incrimination, but this extension in no way depends upon the holding in *Murphy;* on the contrary *Malloy* broadened the privilege, in the sense in which appellant uses the term "broadened", *ex proprio vigore.* Thus, the *Murphy* court quoted from *Adams* v. *Maryland,* 347 U. S. 179 (1954):

> ". . . a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute. . . ." 378 U. S., at 75-76.

And since *Malloy, supra,* extended the protections of the Fifth Amendment against the States, the language quoted above would apply with equal force in either a state or federal setting. Thus, the protections of the Fifth Amendment had already been broadened before *Murphy* was decided. The task in *Murphy* was to enunciate *how* the operation of the Fifth Amendment was to be applied in the factual circumstances before the Court. *Murphy* held that the Fifth Amendment itself operates to bind the federal government, i.e. absent an immunity statute, and that therefore the federal government could not use compelled testimony or its fruits in a subsequent prosecution of a witness granted state immunity. Stated another way, the Court held that the Fifth Amendment itself required "use plus fruits" immunity.

The above suggests that the Court based their decision not on some theory which, when coupled with the Fifth Amendment, allows two separate scopes of immunity to replace the Fifth Amendment, depending upon the witness' position vis à vis the compelling or non-compelling jurisdiction, but rather on the theory of what is required of the Fifth Amendment itself, without any external theoretical support. This corresponds to the third choice open to the Court. Thus *Murphy* could have read *Counselman,* as appellee contends the Court did in fact read it, as requiring only "use plus fruits" immunity, and thereby merely followed the aegis of *Malloy* by applying the "same standard" which it read *Counselman* as setting down 70 years earlier. Under this analysis, there is no necessity either to imply conflicts between the decisions in *Counselman* and *Murphy* or to postulate any theory other than the Fifth Amendment itself to arrive at the conclusion reached by the *Murphy* court. Thus, the third approach provides a more logical and symmetrical method of solving the

problems faced by both courts and also avoids suggestion of unnecessary conflict between them. It is appellee's contention that it is on this latter theory that the *Murphy* decision was based.

That this Court still remained troubled by the immunity question, however, cannot be gainsaid. In *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70 (1965), the Court held that the immunity granted by §4(f) of the Subversive Activities Control Act of 1950, 64 Stat. 992, 50 U. S. C. §783(f) was invalid because "[i]t does not preclude any use of the information called for . . ., either as evidence or as an investigatory lead." Ibid, at 80. The Court cited *Counselman, supra,* as requiring "absolute immunity against future prosecution . . .", but it is clear that the statute before the Court in *Albertson, supra* was substantively identical with the statute before the Court in *Counselman, supra.* Thus, the focus of the decision was on the fact that the immunity statute in *Albertson, supra,* granted mere use immunity and was therefore held not constitutionally sufficient. Presumably *Albertson,* therefore, throws no greater light on the instant controversy than did *Counselman,* since it merely presented a series of facts which no more compelled a decision as to whether "use plus fruits" immunity is constitutionally sufficient than did *Counselman* itself. And in *Stevens* v. *Marks,* 383 U. S. 234 (1966), the Court, per Mr. Justice Douglas, Ibid., at 244-245, and Mr. Justice Harlan, concurring in part and dissenting in part, Ibid., at 249-250, indicated that the necessary scope of immunity question was still unresolved.

Most recently, three decisions have been handed down which further intensify the instant controversy. In *In the Matter of the Grand Jury Testimony of Joanne Kinoy,*

—— F. Supp. —— (D. C. S. D. N. Y. 1971), the Court struck down the New Federal Witness Immunity Statute, Title II of the Organized Crime Control Act of 1970, 18 U. S. C. §§6001-6003 which is very similar to the instant statute. 18 U.S.C. §6002 provides in relevant part:

> ". . . no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

The Court claimed that *Counselman* v. *Hitchcock, supra* in its view, had not been specifically overruled and that consequently a District Court had no power to reverse it. In the Court's own words:

> "Since the Supreme Court has not overruled its requirement that as between the questioning sovereign and the witness only an immunity statute granting transactional immunity is sufficiently broad to replace the constitutional privilege, this court is without power to do so." *In re Joanne Kinnoy,* Slip opinion, February 1, 1971, at 33.

Thereafter, the Ninth Circuit upheld the constitutionality of §6002 in *Stewart and Kastigar* v. *United States, No.* 71-1212, 1213 (9th Cir., March 29, 1971).

The Court maintained:

> "There appears to be no question but that a 'transaction' statute affords the protection that the Fifth Amendment requires. Here we examine a different statute to determine whether it also may be constitutional. We find that it is.

> No case has been cited in which the Supreme Court has held that *only* a transaction statute will suffice, and we have found none. On the contrary, it appears that *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U. S. 52 (1964), has decided the issue here both with respect to the scope of *Counselman* and also with respect to the extent of the requirements of the Fifth Amendment—at least as the latter apply here."

In *Murphy* the Court considered *Counselman* and then stated the rule to be:

> "[W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." 378 U. S. at 79.

The Court added this significant footnote:

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 378 U. S. at 79 n. 18.

It seems apparent this footnote that the Court does not believe that the immunized testimony must bar all *prosecution* for the "transaction" about which he testified. Rather, the Court makes clear that any evidence used must be free from all taint of compulsion. There

must be an "independent legitimate source" for it other than from that evidence produced by the witness under compulsion and its fruits.

The statute now under question appears clearly within the protective limitations of the Fifth Amendment as construed by *Murphy*. It proscribes the use of the testimony "or other information" compelled, together with "any information directly or indirectly derived from such testimony or other information." See also *Zicarelli v. New Jersey State Commission of Investigation*, 55 N. J. 249 (1970); 261 A. 2d 129, 137-40 (1970), Prob. juris. noted, 39 U.S.L.W. 3375 (U. S. March 2, 1971) (No. 91)."

In an even more recent case however, *In re Korman*, No. 71-1328 (7th Cir., May 24, 1971), the Seventh Circuit held §6002 unconstitutional, disagreeing with the Ninth Circuit's opinion that *Murphy, supra*, had relaxed the *Counselman* transactional immunity standard.

As of today therefore, the co-extensiveness test set forth in *Counselman, supra*, remains unimpaired and firmly embedded in our jurisprudence. The question remains whether transactional immunity is required to meet that test or whether "use plus fruits" immunity will suffice to achieve that end.

B. The language of the Fifth Amendment and the values and policies which it serves are fully vindicated by the instant "use plus fruits" immunity statute.

(1) The language of the Fifth Amendment compels the "use plus fruits" standard.

The Fifth Amendment states:

> "No person . . . shall be compelled in any criminal case to be a witness against himself."

Logically, the Fifth Amendment requires that any rule designed to supplant it leave the individual in no worse posture than if his claim to silence based upon the amendment had been sustained. Thus, in hypothetical (a), if X, a witness, invokes his claim to Fifth Amendment protection and that claim is sustained, then he is as fully protected by the Fifth Amendment as is possible. In hypothetical (b) however, if Y, a witness, refuses to answer incriminating questions but is tendered an immunity to supplant his Fifth Amendment privilege, it follows that he must be afforded protection under that immunity fully co-extensive with the protection which X, above, obtained by remaining silent, i.e. the protection of the Fifth Amendment itself. It is clear that to postulate a Fifth Amendment protection in hypothetical (a) which would absolutely preclude prosecution of X as to the charge against him would be absurd. This follows from the fact that the government in (a) may prosecute X, on the basis of other lawfully-acquired independent evidence which it may have amassed against X. If this be so, then in hypothetical (b), the immunity granted Y, to be fully co-extensive with the Fifth Amendment itself, can proceed no further than to bar the use of Y's compelled testimony and any fruits derived therefrom. As Chief Justice Weintraub observed in *In re Zicarelli*, 261 A. 2d 129, 55 N. J. 249, 267 (1970):

> "On the face of things, an immunity from *prosecution* would exceed what the Fifth Amendment protects, for the Fifth Amendment protects the witness only with respect to what the witness himself can furnish and not from evidence from other sources."

Thus, to require transactional immunity in situation (b) would be to place Y in a *better* position vis-a-vis the gov-

ernment compelling his testimony than X would be with respect to the same government. Under the transactional immunity standard, Y would become absolutely immune from future prosecution for the offense to which the questions relate, while X could still be prosecuted on the basis of independent evidence. This situation in turn poses serious difficulties under the "equal protection" clause of the Fourteenth Amendment. For it is difficult to rationalize the different treatment of X and Y above under the same constitutional provision without running afoul of that clause.

The drama of this anomalous situation is heightened in the following hypothetical: A assaults B, is arrested by C and is charged with the offense. Upon being released on bond, A attempts to bribe C to dispose of the implements used in the assault. C, an honest police officer, reports the attempt to the prosecutor. A is then tried, convicted and sentenced for the assault. One year later, A is subpoenaed before a grand jury investigating certain alleged conspiracies. He is granted immunity in exchange for his testimony, which deals exclusively with his assault on B. Then C is called before the same grand jury and testifies as to A's attempted bribe. The grand jury then returns a true bill against A for the attempted bribery. A essays to set up his testimony under immunity before the grand jury as a plea in bar to prosecution. The question is whether the immunity granted is a good defense. It is clear, under these circumstances that there was an independent, *prima facie* case for attempted bribery made at the time when A attempted to bribe C and C reported the attempt to the prosecutor. Further, C was called before the grand jury a year subsequent to the bribery attempt and testified under the immunity grant only with respect to the assault he per-

petrated on B. It is also clear that C's testimony before the grand jury was based upon the actual bribery attempt made by A one year prior to either A's or C's appearance before the grand jury. It is likewise patent that, had A never been summoned before the grand jury and never been granted immunity, with respect to the attempted bribery charge he could have been prosecuted on the basis of independent evidence, and his right to remain silent under the Fifth Amendment would not and could not have been a bar to that prosecution. Further, following the analysis of the hypotheticals above, A, having testified before the grand jury under a grant of immunity, should be in no better position than if he had not been compelled to testify at all. Accordingly, if A can be prosecuted on the basis of independent evidence when his Fifth Amendment claim was sustained, then there is no compelling reason why he should not be prosecuted on the same basis i.e. independent evidence, after a grant of immunity. The terms of the Fifth Amendment can mean no less. But they should not be construed to mean more. A person should not be allowed to claim *greater* protection under a grant of immunity than the Fifth Amendment itself affords. Yet this contradictory position is advanced by Appellant, when he quotes from *Piccirillo* v. *New York*, —— U. S. ——, 27 L. Ed. 2d 596, 606 (1971), Mr. Justice Brennan, dissenting: "[with respect to the words of the privilege . . . the self-incrimination clause] prohibits the application vel non of compulsion to an individual to force testimony which incriminates him, regardless of whether he is ever prosecuted." (citation omitted). Since the reach of the privilege is the *possibility of a criminal charge* and not whether one is in fact brought, *it is only when there is no possibility of a criminal case* that the privilege ceases to apply (*Appellant's Brief*, at 21). Appellant goes on to quote, "the fact that the criminal case may not be based upon that

compelled testimony does not avoid the problem. The individual is "still being forced by the State to admit criminal conduct for which he may be punished, albeit not on the basis of his compelled testimony." Thus, use immunity "permits the compulsion without removing the criminality." Ibid.

The fallacy in this argument is that begs the entire question of the scope of immunity necessary under the Fifth Amendment. The reasoning is circular. It assumes its conclusion i.e. that only transaction immunity can replace the Fifth Amendment, and then proceeds to conclude its assumption i.e. therefore only transactional immunity will suffice. Thus far it is merely a tautology based upon a predetermined conclusion. Further, the argument is elliptical. It begins, "since the reach of the privilege", which it says, is the "possibility of a criminal charge . . .", it is only when there "is no possibility of a criminal case that the privilege ceases to apply." But the language of the Fifth Amendment will not support such analysis. By its own terms it says that "No person . . . shall be compelled in any criminal case *to be a witness against himself.*" Thus, the argument should properly read—since the reach of the privilege is the possibility of a criminal charge *based upon evidence or testimony compelled . . .*, it is only when there is no possibility of a criminal case based upon evidence or testimony compelled that the privilege ceases to apply.

As long as there is no casual connection between the compelled testimony and a subsequent prosecution "relating to that very testimony" i.e. as long as the State's case is based on sources completely independent of the compelled testimony, there is no good reason or policy not to let it proceed. And the statement that "the individual is still being forced by the State to admit criminal con-

duct for which he may be punished, albeit not on the basis of his compelled company" scarcely adds any weights to this otherwise bouyant argument. For as long as the person "shall not be compelled . . . *to be a witness against himself*" i.e. by bearing compulsory witness to his offense and then being prosecuted on that, or some derivative basis, the language of the Fifth Amendment is amply satisfied. The concluding passage that use immunity "permits the compulsion without removing the criminality", places "compulsion" and "criminality" on intersecting rather than parallel planes, and thus sets an unnecessary collision course between two factually unrelated phenomenon. To further the analogy properly, it is not the "compulsion", but rather the *use* of testimony compelled which is on a collision course with "criminality." See *Murphy* v. *Waterfront Commission, supra* at 107 (Mr. Justice White, concurring):

> "The real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminatory testimony was that thought to in here in *using* a man's compelled testimony to punish him. *Feldman* v. *United States,* 322 U. S. 487, 500, 64 S. Ct. 1082, 1088 (Black, J., dissenting)." (Emphasis added.)

(2) The instant "use plus fruits" immunity statute advances an exclusionary rule which fully replaces the Fifth Amendment privilege against self-incrimination.

Any discussion of "use plus fruits" immunity or, more precisely, the exclusionary rule concept in the Fifth

Amendment area[1] must begin with a brief discussion of cases leading to the formulation of the established exclu-

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[1] The Fifth Amendment seems to carry a stricter rule of exclusion within its own terms than, for example, the Fourth Amendment. Thus, the language of the Fifth Amendment, "'No persons shall be compelled in any criminal case to be a witness against himself'', signifies that all compulsion by the government used to make a person incriminate himself is *ipso facto*, proscribed. But, the emphasis is placed on the *use* rather than the compulsion of incriminating testimony. Thus, it is said:

> "And history supports no argument that the framers of the Fifth Amendment were interested only in forbidding the *extraction* of an accused's testimony, as distinguished from the *use* of his extracted testimony. The extraction of testimony is, of course, but a means to the end of its use to punish . . . The real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminating testimony was that thought to inhere in using a man's compelled testimony to punish him.'' *Feldman* v. *United States*, 322 U. S. 487, 499-500 (1944), (Black, J., dissenting), cited with approval in *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U. S. 52, 107 (1964), White, J. concurring.

Thus, the real focus of the Fifth Amendment is on *use* of compelled testimony, rather than on the *compulsion* of that testimony, which is but a means to the end of use itself. In this sense, the Fifth Amendment exclusionary rule designed to *supplant* the Fifth Amendment itself, may be stricter in its operation than the Fourth Amendment exclusionary rule which is designed to *deter* certain types of unlawful governmental activity, to wit, ''unreasonable searches and seizures''. The upshot of the Fourth Amendment exclusion, with its underlying rationale of deterrence of unlawful police activity, is thus not the preclusion of all use of illegal evidence to protect the individual, but rather ''to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. *Mapp* v. *Ohio*, 367 U. S. 643, 656 (1961). See also *Elkins* v. *United States*, 364 U. S. 206, 217 (1960), and *Note, Scope of Taint Under the Exclusionary Rule of the Fifth Amendment Privilege Against Self-Incrimination*, 114 U. Pa. L. Rev. 570 (1966).

sionary rule in the Fourth Amendment area. In the landmark case of *Boyd* v. *United States*, 116 U. S. 616 (1886), the Court noted the strong interrelationship between the Fourth and Fifth Amendments. The Court said:

> "It is not the breaking of . . . doors and the rummaging of drawers, that constitutes the essence of the offense; but is the invasion of (the) indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited . . . which constitutes the essence of (the violation of the Fourth Amendment). Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation (of the Fourth Amendment). In this regard the Fourth and Fifth Amendments run almost into each other." 116 U. S. at 630.

In striking down the statute before it as violating the spirit of both the Fourth and Fifth Amendments, the Court continued *supra* at 633:

> "We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seiz-

ure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

The *Boyd* Court dealt with a constitutional question, to wit, the constitutionality of a section of a federal revenue statute,[2] the resolution of which was based on the con-

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[2] Act of June 22, 1874, § 5, 18 Stat. 187 which reads:

"In all suits and proceedings other than criminal, arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any business book, invoice, or paper belonging to, or under the control of, the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced the said attorney shall be permitted, under the direction of the court, to

(Footnote continued on following page)

current operation of the Fourth and Fifth Amendments. While the constitutional basis for the Fourth Amendment exclusionary rule is predicated upon this interrelationship,[3] "(t)he interrelationship between the Fourth and Fifth Amendments in this area (i.e. of Fourth Amendment exclusion) does not, of course, justify a narrowing in the interpretation of either of these Amendments with respect to areas in which they operate separately." *Mapp* v. *Ohio*, 367 U. S. 643, 662 (Black, J., concurring). *Boyd, supra*, was followed by *Counselman* v. *Hitchcock, supra*, which relied on the authority and language of *Boyd*,[4] to support its conclusion. The *Counselman* Court concluded its opinion by stating:

> ". . . an we consider that the ruling on this court in *Boyd* v. *United States, supra*, supports the view we take." 142 U. S. at 586.

But the decision in *Counselman* rested on the Fifth Amendment as it operates in its *own separate* sphere, and not on the interrelationship between the Fourth and Fifth

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(*Footnote continued from preceding page*)

make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice, or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid."

[3] *Weeks* v. *United States*, 232 U. S. 383, 398 (1914); *Mapp* v. *Ohio*, 367 U. S. 643, 660 (1961).

[4] 142 U. S. at 580-582, 586.

Amendments. The subsequent decisions of *Brown* v. *Walker, supra,* and *Hale* v. *Henkel, supra,* followed in the wake of *Boyd* and *Counselman* to establish the transactional immunity standard. The importance of these observations is that, at the time the question of the necessary scope of immunity to supplant the Fifth Amendment privilege arose in the cases above, there was no existing rule of exclusion[5] available to the courts to effectively safeguard the protections afforded by the Fourth and/or Fifth Amendments.[6] And the alternatives available to

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[5] The Fourth Amendment exclusionary rule was first enunciated as a rule of constitutional law in *Weeks* v. *United States,* 232 U. S. 383 (1914). *Weeks, supra,* involved the taking of certain documents by a federal officer without a warrant. These documents were admitted at defendant's trial, over his seasonable application for their return. *Held* that the use of the seized evidence involved "a denial of the constitutional rights of the accused." *Ibid.,* at 398. The Fourth Amendment was first applied against the States in *Wolf* v. *Colorado,* 338 U. S. 25 (1949), but the *Wolf* court declined to extend to the States the *Weeks* exclusionary rule. *Ibid.,* at 33. It was not until *Mapp* v. *Ohio,* 367 U. S. 643 (1961) that the court extended the *Weeks* rule of exclusion to the States.

[6] As late as *Adams* v. *New York,* 192 U. S. 585, 594-598 (1904), the court still adhered to competency and relevancy rules as governing the admissibility of evidence at trial. The court stated the then accepted rule:

> "It may be mentioned in this place that through papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question." 192 U. S. at 595.

courts at that time to protect constitutional rights, for example, by way of voiding unconstitutional statutes[7] or providing for private redress by way of common law actions against the violators of these rights,[8] proved to be more illusory than real.[9] Accordingly, Courts solicitous of protecting the individual against unwarranted governmental invasions, were hard-pressed for an acceptable solvent to the problem prior to the creation of the exclusionary rule. The tact taken by the Court from the time of *Counselman* until the adoption of the exclusionary rule to resolve the Fifth Amendment immunity dilemma was perforce heavy-handed, if not justifiable, in light of the dearth of tools then available to solve said problem. Accordingly, the transactional immunity standard putatively set down by *Counselman* reflected an attitude of over-protection at a time when the alternative solution to this problem was insufficient protection.

The instant statute,[10] however, reflects a careful imple-

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[7] *Boyd* v. *United States, supra.*

[8] See *Wolf* v. *Colorado,* 338 U. S. 25, 30 n. 1.

[9] See *Mapp* v. *Ohio, supra.*

[10] New Jersey Statutes Annotated, Title 52, Chapter 9M, Section 17 (L. 1968, c. 266, § 17)—provides:

> "a. If, in the course of any investigation or hearing conducted by the commission pursuant to this act [chapter], a person refuses to answer a question or questions or produce evidence of any kind on the ground that he will be exposed to criminal prosecution or penalty or to a forfeiture of his estate thereby, the commission may order the person to answer the question or questions or

(*Footnote continued on following page*)

mentation of the exclusionary rule, which gained initial recognition in *Weeks* v. *United States,* 232 U. S. 383 (1914), and was subsequently applied against state action in *Mapp* v. *Ohio,* 367 U. S. 643 (1961). Thus, from the time of inception, the rule of exclusion has had, to date, almost 60 years to mature and develop. Through those years the above rule has been expanded and refined through the "fruit of the poisonous tree" doctrine, first enunciated in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920) and subsequently developed in *Nardone* v. *United States,* 308 U. S. 338 (1939) and most recently modified in *Wong Sun* v. *United States,* 371 U. S.

(*Footnote continued from preceding page*)

produce the requested evidence and confer immunity as in this section provided. No order to answer or produce evidence with immunity shall be made except by resolution of a majority of all the members of the commission and after the attorney general and the appropriate county prosecutor shall have been given at least 24 hours written notice of the commission's intention to issue such order and afforded an opportunity to be heard in respect to any objections they or either of them may have to the granting of immunity.

b. If upon issuance of such an order, the person complies therewith, he shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate, except that such person may nevertheless be prosecuted for any perjury committed in such answer or in producing such evidence or for failure to give an answer or produce in accordance with the order of the commission; and any such answer given or evidence produced shall be admissible against him upon any criminal investigation, proceeding or trial against him for such perjury, or upon any investigation, proceeding or trial against him for such contempt."

471 (1963). These rules were adopted to avoid reducing, in the words of Mr. Justice Holmes, "... the Fourth Amendment to a form of words." *Silverthorne Lumber Co.* v. *United States, supra* at 392. And they have been found to be effective methods of implementing the dictates of the Fourth Amendment. They are directed not only to the deterrence of unlawful police activity, *Mapp* v. *Ohio,* 367 U. S. 643, 656 (1961), but also at maintaining the "imperative of judicial integrity" and respect for law, Ibid., at 659. Further, in the Sixth Amendment area, the rule of exclusion has been applied to render inadmissible statements unlawfully obtained from a defendant, free on bail, in the absence of retained counsel. *Massiah* v. *United States,* 377 U. S. 201 (1964). This rule was subsequently applied against the states in *McLeod* v. *Ohio,* 381 U. S. 356 (1965). In cases involving violations of the Fourth and Sixth Amendments then, the remedy developed by this Court to redress the wrongs committed has not been to bar prosecution altogether, but rather to suppress the evidence and its fruits. Indeed, even in the area of possible Fifth Amendment violations, this Court has intimated that barring prosecution is too drastic a step to take. Thus, in *United States* v. *Blue,* 384 U. S. 251 (1966) the Court, per Mr. Justice Harlan, held that in a proceeding on deficiency assessments, even if the government acquired incriminating evidence in violation of the Fifth Amendent, the taxpayer was not thereby entitled to a bar of an income tax evasion prosecution, but would at most be entitled to suppress evidence and its fruits if they were sought to be used against him at a criminal trial. As the Court stated:

> "Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the

> prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book." Ibid. at 255.

Moreover, the "use plus fruits" immunity standard has strong support from the treatise writers. Dean Wigmore in his Evidence Treatise advocates that standard, and cites numerous pre-*Counselman* cases in support of it. 8 Wigmore, Evidence § 2283 (3rd Edition 1940):

> "The constitutional efficacy of this type of statutes ("use plus fruits") for their purpose was well expounded by the following early opinions, written at a period nearer to the era of constitution-making, when the cobwebs of artificial fantasy had not begun to obscure its plain meanings: 1853, Scott, J., in *State* v. *Quarles,* 13 Ark. 307, 311: The privilege in question, in its greatest scope, as allowed by the common law—and no one, be he witness or accused, can pretend to claim it beyond its scope at the common law—never did contemplate that the witness might not be proved guilty of the very crime about which he may be called to testify; but only that the witness should not be compelled to produce the evidence to prove himself guilty of that crime. His privilege, therefore, was not an exemption from the consequences of a crime that he might have committed; but only an exemption from the necessity of himself producing the evidence to establish his own crime . . ." Ibid., at 523-524.

And in discussing the so-called transactional immunity standard of the *Counselman* decision, Wigmore states:

> "It is unfortunate that the Court in which the latter pronouncement was made [i.e. in *Counselman*] should have allied itself with such feeble forces." Ibid., at 528.

This same view is also taken by Professor McNaughton, 8 Wigmore, Evidence § 2283 (McNaughton rev. 1961); and Professor McCormick, McCormick Handbook on the Law of Evidence § 135 (1954).

Two years after *Blue,* the Court decided three cases involving various forms of registration or taxation which would have obligated persons so registering or so paying taxes to incriminate themselves. Thus, in *Marchetti* v. *United States,* 390 U. S. 39 (1968), defendant was indicted and convicted for failure to pay an occupational tax on wagering and for failure to register before engaging in the business of accepting wagers. The Court reversed, per Mr. Justice Harlan, holding that those who properly assert the constitutional privilege as to the provisions requiring payment of tax and registration, may not be criminally punished for failure to comply with their requirements. However, the Court was urged by the government to impose restrictions upon the use by federal and state authorities of information obtained as a consequence of compliance with these requirements. The Court said:

> "The Government's suggestion is thus in principle an attractive and apparently practical resolution of the difficult problem before us." 390 U. S. at 58.

The Court declined to take such action because it felt that to do so would defeat the clear congressional purport to provide such information to interested prosecuting authorities, and as such would constitute judicial in-

terference with congressional prerogatives. In *Grosso* v. *United States,* 390 U. S. 62 (1968) a wagering tax system similar to the one noted in *Marchetti, supra,* was found to have placed an impermissible constitutional burden upon a person convicted of failure to pay the tax, and his conviction was accordingly reversed. The Court again declined to apply a use restriction upon the information thus obtained by the government "for reasons discussed in *Marchetti.*" 390 U. S. at 69. Thus, once again, the Court found the principle of applying, in effect, a "use plus fruits" immunity, an attractive and practical resolution to the problem before it, but declined to do so for reasons unrelated to the efficacy of such a solvent. Finally, in *Haynes* v. *United States,* 390 U. S. 85 (1968), defendant's conviction for possession of a firearm which he failed to register under the National Firearms Act was held not constitutionally permissible, and that proper claim of the constitutional privilege against self-incrimination provided a full defense to prosecution either for failure to register or for possession of an unregistered firearm under the Act. And again the Court declined to impose a use restriction upon the information thus obtained "for reasons indicated in *Marchetti, supra,* and *Grosso, supra.*" 390 U. S. at 100. Thus, in all three cases, the Court was willing, although unable to, in effect, grant a "use plus fruits" immunity with respect to either federal or state use of information to vindicate the rights afforded under the Fifth Amendment.

In another line of cases, dealing with the requirements of public officials or employees to give an accounting of their public duties, and applying the Fifth Amendment privilege to these situations, this Court has consistently held that imposing an immunity from use of compelled testimony and its fruits was sufficient to protect such em-

ployees' Fifth Amendment rights. Thus, in *Garrity* v. *New Jersey*, 385 U. S. 493 (1967), where there was no immunity statute to protect witnesses, it was held that statements made by police officers, who were questioned about their official duties and who were told that their reliance upon the Fifth Amendment privilege against self-incrimination would subject them to removal from office, could not be used in a subsequent criminal prosecution against them. The reason was that threat of removal constituted the kind of compulsion against which the constitutional privilege was directed and that statements made under such compulsion could not be *used* at a subsequent criminal trial. Once the compulsion was found therefore, the remedy was to bar *use* of compelled statements at a criminal trial, not to bar prosecution altogether. 8 Wigmore, Evidence § 2270 at 417-19 (McNaughton rev. 1961); citing *inter alia*, *Adams* v. *Maryland*, 347 U.S. 179, 181 (1954), wherein it was said, per Black, J.: "Indeed a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without statute." On the same day *Garrity*, *supra*, was decided, the Court also held, in *Spevack* v. *Klein*, 385 U.S. 511 (1967) that New York could not disbar a lawyer solely for refusing, on the basis of his Fifth Amendment privilege, to produce financial records and to testify at a judicial inquiry into "ambulance chasing". However, this did not absolutely preclude disbarment. The Court reserved the possibility of disbarment based upon material obtained independently of any compelled testimony. Then, in *Gardner* v. *Broderick*, 392 U.S. 273 (1968), and *Uniformed Sanitation Men Association* v. *Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968), the Court held, per Fortas,

J., that refusal of public employees to sign waivers of immunity, or their invocation of the privilege against self-incrimination before a grand jury investigating performance of their official duties, could not constitutionally result in their discharge from office. The Court reasoned that such action violated their constitutional privilege against self-incrimination. Speaking for the Court in *Gardner, supra,* Mr. Justice Fortas stated, 392 U.S. at 276:

> "Answers may be compelled regardless of the privilege *if there is immunity from federal and state use of the compelled testimony of its fruits* in connection with a criminal prosecution against the person testifying. *Counselman* v. *Hitchcock, supra,* 142 U.S. at 585-586, 12 S. Ct. at 206-207. *Murphy* v. *Waterfront Commission, supra,* 378 U.S. at 79, 84 S. Ct. at 1609". (Emphasis added.)

More recently, the Second Circuit held in *Uniform Sanitation Men Association* v. *Commissioner of Sanitation,* 426 F.2d 619 (2nd Cir. 1970), per Friendly, J., that where the city granted immunity to sanitation department employees from the use of answers to questions relating to performance of their official duties in subsequent criminal prosecutions and did not require any waiver of immunity, that the city was warranted in dismissing the employees upon their refusal to answer the questions. Judge Friendly noted in his opinion that ". . . 'use immunity' suffices for the discharge of public employees who 'refuse to account for their performance of their public trust', and that "(e)ven if use immunity should ultimately be held insufficient in the *Counselman* situation, which we in no way intimate, there would be sufficient reasons to support a less stringent requirement with respect to im-

munity where the issue is not whether a witness should be put in jail until he answers but whether a public employee should be dismissed for refusal to give an account of his official conduct." Ibid., at 626. It is the position of appellee that a "use plus fruits" immunity should be upheld as valid in both of the situations described above, and that accordingly cases such as *Garrity, supra, Spevack, supra, Gardner, supra,* and *Uniform Sanitation Men Association, supra,* support the view the Commission advances, i.e., that "use plus fruits" immunity is constitutionally sufficient to replace the Fifth Amendment privilege against self-incrimination. The Court in *Gardner, supra,* for example, did not qualify its view that "use plus fruits" immunity was a proper immunity configuration in the circumstances of that case by indicating that such an immunity would suffice only because the person involved was a public employee. Rather, the Court cited *Garrity* for the proposition that an employee's statements may not be used against him in a *criminal prosecution,* and concluded that there is no relinquishment of a constitutional privilege in his being forced to account for his official conduct. The central concept, then, is use restriction vis-a-vis possible prosecution. Thus, Mr. Justice Fortas stated in *Gardner*:

> "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties without being required to waive his immunity with respect to the use of his answers or the fruits thereof *in a criminal prosecution* of himself, *Garrity* v. *State of New Jersey, supra,* the privilege against self-incrimination would not have been a bar to his dismissal." 392 U.S. at 278 (Emphasis added.)

In fact, the Court, after noting the necessary parameters of a grant of immunity, cites *Counselman* and *Murphy,*

supra, as supporting the view it takes. 392 U.S. at 276. This would suggest that the Court veiwed the constitutional question in *Gardner* in the same light and as controlled by the same considerations which it understood *Counselman* and *Murphy* as applying. Moreover, there are forceful reasons why this should be so. If a public employee were apprehensive only about the loss of his public position, perhaps a "less stringent requirement" under the Fifth Amendment could be justified. But this is not the case. For in these circumstances there is also a real fear of criminal prosecution based on the account given of public conduct under compulsion. Otherwise there would be no reason to compel an accounting of public service at first instance. This Court in *Uniform Sanitation Men, supra*, recognized this dilemma when it stated, 392 U.S. at 283:

> "Petitioners were not discharged merely for their refusal to account for their conduct as employees of the city. . . . They were discharged for refusal to expose themselves to *criminal prosecution* based on testimony which they would give under compulsion, despite their constitutional privilege." (Emphasis added.)

Thus, while the "less stringent" standard might conceivably apply to a situation where the *sole* threat was dismissal, it clearly cannot apply where there is also a real fear of criminal prosecution. The Fifth Amendment can surely mean no less.

As earlier indicated, the Fifth Amendment rule of exclusion need not be identical with the Fourth[11] or Sixth Amendment rules. For one thing, a grant of Fifth

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[11] Appellee's Brief, at 30 N. 1.

Amendment immunity is a substitute for the Fifth Amendment itself, and is intended to "prevent harm to the particular individual" receiving it.[12] However, the Fourth Amendment exclusionary rule is not the substance of the right itself, but the means by which the constitutional right is enforced. The exclusion of evidence seized in violation of the Fourth Amendment is derivative and remedial; it is a means to enforce the primary aspect of the right—that illegal searches and seizures should not take place.[13] The exclusionary rule is therefore designed "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[14] Viewing the primary function of the Fourth Amendment exclusionary rule as one of deterrence, the right to privacy thereunder is, in terms of the rule, a right to be looked on as it relates to society as a whole and not to the particular defendant or witness in question. Exclusion is thus not intended to place the defendant in the position in which he would have been but for the illegal search and seizure, but is designed instead to curb police activity in general as it violates the Fourth Amendment.[15] By contrast, the ex-

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[12] See Note: *Scope of Taint Under the Exclusionary Rule of the Fifth Amendment Privilege Against Self-Incrimination,* 114 U. Pa. L. Rev. 570, 573 (1966).

[13] *Ibid.*, at 573-574.

[14] Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized,* 56 Cal. L. Rev. 579, 580 (1968), citing *Mapp* v. *Ohio, supra* at 656.

[15] 114 U. Pa. L. Rev. at 574, *Mapp* v. *Ohio, Ibid.*, at 656. It is worth reiterating at this juncture that the Fourth Amendment

(*Footnote continued on following page*)

clusionary rule in the Fifth Amendment area does not implement the rule of silence but rather supplants it. As noted before, the right the immunity grant supplants is a right to absolute proscription of *use* of compelled testimony. As Mr. Justice Black said in his dissenting opinion in *Feldman* v. *United States*, 322 U.S. 487, 499-500:

> "The real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminating testimony was that thought to inhere in *using* a man's compelled testimony to punish him." (Emphasis added)

Since this rule is more closely linked with the rights of the individual and is a more integral part of the privilege than the Fourth Amendment exclusionary rule, it may be necessary for courts to develop a different and perhaps less flexible manner of applying it. Thus, to meet the coextensiveness test of *Counselman, supra*, it might be necessary that the "independent source" test of *Murphy, supra* at 79, be construed as meaning that a sovereign

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exclusionary rule is intended primarily to deter unlawful police activity, and only incidentally to render inadmissible evidence seized in violation of the Fourth Amendment. *Mapp.* v. *Ohio, supra.* But even if the primary target of the rule is taken to be the barring of use of illegally obtained evidence, the amendment does not preclude *all* use of illegally seized evidence. For it is possible, under existing case law, to *use* tainted evidence seized in violation of the Fourth Amendment as long as the "... evidence to ... which ... objection is made has been come at by ... means sufficiently distinguishable to be purged of the primary taint." *Wong Sun* v. *United States*, 371 U. S. 471, 488 (1963). Thus, the Fifth Amendment's *absolute* requirement against use of compelled testimony at trial may well demand a stricter rule of exclusion to support that requirement.

wishing to prosecute after a grant of immunity be required to use only that which is in no way causally related to the compelled testimony. The evidence used must have *an entirely independent origin,* not the mere possibility that it could have had such an origin or even that it would have had such an origin.

The development of the "fruit of the poisonous tree" doctrine[16] lends support to this analysis. The first case to recognize the doctrine was *Silverthorne Lumber Co.* v. *United States.*[17] In discussing the prohibition of the use of tainted evidence, the Court, per Holmes, J., said, 251 U. S. at 392:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be be used by it in the way proposed."

A broad reading of *Silverthorne* leads to the conclusion that illegally seized evidence may never be used by the government although facts revealed by that evidence may be obtained from an independent source. Some nineteen years later, the Court modified the *Silverthorne* doctrine in *Nardone* v. *United States,* 308 U.S. 338 (1939). After reiterating the "independent source" rule of *Silverthorne,* the Court went on to observe:

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[16] See Appellee's Brief, at 36-37.

[17] 251 U. S. 385 (1920).

> "In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. . . ." 308 U.S. at 341.

The additive of an attenuation limitation relaxes the original "independent source" test by conceding the possible existence of taint in admissible evidence but arguing that it has become dissipated. Most recently, a third variation on the taint theme was enunciated in *Wong Sun* v. *United States*, 371 U.S. 471 (1963). The Court stated:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint'." Ibid., at 487-488.

This rule is still more relaxed than the *Nardone* test, for it holds that illegally obtained evidence is not sacred or inaccessible when the government learns of it from a source separate and distinct from its own illegal activity. Thus, evidence is not necessarily the "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police.[18] It is respectfully

[18] Pitler, *supra* at 593-594.

submitted that this Court's articulation of an unqualified "independent source" test in *Murphy*,[19] implicitly rejects the two most recent tests of *Nardone* and *Wong Sun* and reaffirms the original *Silverthorne* test. It is further submitted that this conforms to the analysis that the Fifth Amendment exclusionary rule may have to be stricter than the exclusionary rule which sprang from the Fourth Amendment in order to protect the different values and policies which the former embraces.

Appellant maintains that "adoption of a use-immunity standard would also add yet another type of pretrial motion to burden courts already beset by a mounting caseload." *Appellant's Brief*, at 28. Next, appellant quotes from Judge Motley's opinion in *In re Grand Jury Testimony of Joanne Kinoy*, —— F. Supp. ——, (D.C.S.D.N.Y. 1971) in support of the above point. Ibid., at 28-29. Then appellant continues by maintaining, at page 29 of his brief:

> "Transactional immunity raises none of these problems. It provides the individual with an assurance that he is not testifying about matters for which he may later be prosecuted. No question arises of tracing the use or non-use of information gleaned from the witness' compelled testimony. The sole question presented to the Court is whether the subsequent prosecution is related to the substance of the compelled testimony. . . . *Piccirillo* v. *New York*, 27 L. Ed. 2d at 609."

Initially, it might be said of this line of argument that if indeed docket congestion were a valid reason to avoid any additional burdens of litigation in our courts, then the ex-

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[19] 378 U. S. at 79 n. 18. See also Mr. Justice White's concurring opinion in *Murphy, supra* at 102-107.

clusionary rule in the Fourth Amendment and Sixth Amendment areas should likewise be abolished and replaced with a rule barring prosecution with respect to any individual whose Fourth or Sixth Amendment rights were violated. This would, after all, relieve the courts, state and federal, of many of their pretrial burdens. But such a result, apart from being facially absurd, has no support whatever in the cases,[20] and neither appellant nor Judge Motley has cited any authority in support of this novel theory. In fact, there is nothing within our American framework of jurisprudence which excuses courts from the "burden" of hearing motions to suppress. Moreover, the assertion that "transactional immunity raises none of these problems" is simply not true. For example, in *Heike* v. *United States*, 227 U.S. 131 (1913), the Court, per Holmes, J., held that evidence given by a person before a federal grand jury investigating violations of the anti-trust laws, under a grant of transactional immunity, could not defeat a prosecution, in a subsequent proceeding, for a conspiracy to commit an offense against the United States, where the evidence given in the former proceeding did not concern the latter proceeding *in any substantial way*, and has no such tendency to incriminate him as to have afforded a ground for refusing to give it. As the Court said, Ibid., at 144:

> "When the (immunity) statute speaks of testimony concerning a matter it means concerning it in a substantial way, just as the constitutional protection is confined to real danger, and does not extend to re-

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[20] See *Weeks* v. *United States, supra; Mapp* v. *Ohio, supra,* for cases dealing with Fourth Amendment violations, and *Massiah* v. *United States, supra,* and *McLeod* v. *Ohio, supra,* dealing with the Sixth Amendment area.

> mote possibilities out of the ordinary course of law. *Brown* v. *Walker*, 161 U.S. 591, 599, 600; See 5 Wigmore, Ev. § 2281, p. 238."

It is respectfully submitted that the courts likewise have had to assume the additional onus, under the transactional immunity standard, of deciding before trial whether testimony given under such immunity concerns the subject matter of a subsequent prosecution "in a substantial way", as well as deciding generally whether the testimony given had a "tendency to incriminate", so as to have afforded the defendant a ground to refuse to answer in the first place. It is scarcely tenable to suggest these burdens would be any less onerous than pretrial motions to suppress would be under a "use plus fruits" immunity standard. Finally, as Mr. Justice White notes in his concurring opinion in *Murphy, supra*, at 104:

> ". . ., greater requirements or difficulties of proof by a defendant inhere in the rule of absolute immunity. When a witness testifies under the auspices of an immunity act, the immunity he gets does not secure him from indictment or conviction. *Heike* v. *United States*, 217 U.S. 423, 30 S. Ct. 539, 54 L. Ed. 821. The witness must plead and prove, as an affirmative defense, that he has received immunity and that the instant prosecution is on account of a matter testified to in exchange for immunity. *Heike* v. *United States*, 227 U.S. 131, 33 S. Ct. 226, which may pose considerable difficulties where the relationship between the testimony and the prosecution is not obvious or where the immunity is acquired as a result of testimony before a grand jury or in

an *in camera* administrative proceeding. (Citations omitted.)"

Appellant further contends that "despite the fact that under a use immunity statute the government would undoubtedly have the burden of establishing, in a subsequent prosecution, that its evidence was untainted, (citation omitted), enormous practical difficulties would still remain," in ascertaining whether a subsequent prosecution was derived from compelled testimony or from an "independent source". This can be no more than conjecture. By analogy, it may be said that the "fruit of the poisonous tree" doctrine in the Fourth Amendment areas of search and seizure and wire tapping leaves too much latitude and possibilities for abuse in the hands of the prosecutor. For here the police may unscrupulously fail to give full disclosure and do so with the probability that this secretive practice will never be discovered.[21] How-

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[21] It is noteworthy that where other constitutional violations have been committed by the acts of law enforcement officers in the gathering of evidence through unlawful searches and seizures, wiretaps or coerced confessions, the constitutional remedy applied is prohibition of the use of such evidence rather than prosecution itself. *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Hoffa* v. *United States*, 387 U. S. 231 (1967); *United States* v. *Blue*, 384 U. S. 251 (1966). An illegal search, wiretap or coerced confession could be as revealing of investigatory leads as testimony given in exchange for immunity, yet prosecution is not barred in such cases.

Clearly the protection which the Constitution affords against injurious compulsion can be no less when the compulsion is exerted by law enforcement officers than when exerted by the instant statute. Since a ban on prosecution is not required to pro-

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ever, evidence compelled from a witness in an investigation conducted under a grant of immunity is a matter of record, and in an immunity hearing an individual would be painfully aware of the evidence he has given. The prosecutor who wishes to attempt to circumvent the "independent source" test will have to gamble that he can successfully commit the financial resources available for law enforcement to attempt to prosecute the defendant on tainted evidence and sufficiently disguise the basis of his prosecution to convince the court that it rests on legitimate, independently secured evidence. And he will have to do this while running the gauntlet of objections from a defendant who is armed, unlike the search and seizure defendant, with an exact and complete record of what forbidden evidence the government utilized in its original attempt to prosecute him.[22] Moreover, in developing a workable Fifth Amendment rule of exclusion, the courts may feel that a high burden of persuasion is necessary for the government to sustain in order to insure that the sources of its evidence are independent. Of course, the more difficult the burden of persuasion the government has to carry is, the greater the assurance that the evidence it uses

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tect against compulsion by law enforcement, it is certainly not required when the State has compelled testimony and itself has prohibited *use* of any compelled testimony.

Thus, where as here, the immunity offered is "as broad as, but not wastefully broader than the privilege" the statute is valid. 8 *Wigmore*, §2283, page 525; *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 106-107 (1964) (White, J., concurring).

[22] See Comment, *"Federalism and the Fifth: Configurations of Grants of Immunity"*, 12 U.C.L.A. L. Rev. 561, 583-584 (1965).

to prosecute an individual is "independent". For example, in *United States* v. *Pappadio*, 235 F. Supp. 887, 890 (1964), the court held that in a subsequent prosecution of a witness who had testified under immunity before a grand jury, "the burden would be on the Government to prove, *clearly and convincingly*, that all of its proof is derived from sources completely independent of the witness's grand jury testimony, and any clues or leads derived from such testimony." Appellee does not maintain that the burden set out in *Pappadio* is necessarily the best possible test to insure "independent sources"; there are, of course, two alternatives to the "clear and convincing" test, i.e., "preponderance of the evidence" and "beyond a reasonable doubt". The point is that there is a sliding scale of burden of persuasion—gradations, one of which may help to best insure the independence of government evidence in any case where that issue is in focus. Finally, it has been suggested[23] that in order to insure the independence of the government's evidence, the prosecutor should testify under oath (and thus under pain of perjury if he fabricates) to the independence of his evidence and, where possible, bring in support witnesses to corroborate his testimony. Again, appellee does not assert the necessity of such measures, but rather mentions them as possible judicial means to achieve the end sought, i.e., "independent evidence", in a manner which will both protect the individual's Fifth Amendment rights without unnecessarily thwarting the government's attempts to prosecute on the basis of sources independent of compelled testimony. The primary point to be made then is that, as in the area of Fourth and Sixth Amendment exclusion, workable guide-

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[23] See *In re Kovta: The Scope of Immunity Statutes*, 61 Nw. U. L. Rev. 654 (1966).

lines can be drawn by the courts themselves to insure compliance with the dictates of the Fifth Amendment under the "use plus fruits"—immunity standard. The Judiciary has developed such exclusionary rules in constitutional areas as sensitive and fundamental as the area presented in the instant case, i.e., the areas of the Fourth and Sixth Amendments, and there is good reason, both in logic and history to assume that the same type of rule could and should be developed in the Fifth Amendment area. Finally, and regardless of the incidence of convictions obtained based upon such prosecutions, "[i]t is precisely this *possibility* of prosecution based on untainted evidence that we must recognize". *Murphy* v. *Waterfront Commission,* 378 U.S. at 106, White, J., concurring.

The practical effect of the *Murphy* rule, then, will be what the *Counselman* rule attempted to realize—to assure that no man will be compelled to furnish evidence which can be used to convict him of a criminal offense. But unlike *Counselman,* it will not attempt to provide this assurance by requiring immunity "wastefully broader than the privilege" which denies the government the opportunity to prosecute law violators on the basis of evidence not secured by use of their compelled testimony.[24]

C. The values and policies of the Fifth Amendment, as well as compelling practical considerations support the instant "use plus fruits" immunity standard.

For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Harwicke) has the right to every man's evidence. When the various claims of ex-

[24] Comment, *supra* at 584.

emption are examined, the starting premiss is that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from the positive general rule.[25] This maxim is, of course, as true with respect to the Fifth Amendment exemption as it is about any other type of exception. As important an exception as the Fifth Amendment right that "no person shall be compelled in any criminal case to be a witness against himself" is, it should not be arrogated to a plane higher than the equally important general rule, stated above, to which it is an exception. Rather, a balance must be struck to best achieve the primary objectives of both rules, consistent with one another.

As this court stated as recently as *California* v. *Byers*, —— U.S. ——, 39 LW 4579, 4580 (May 8, 1971):

> "'Whenever the court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scruting is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional portections on the other; neither interest can be treated lightly."

Appellee contends and will show that when "the balance" between "public need" and "individual claim to constitu-

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[25] 8 Wigmore, Evidence § 2192 (McNaughton rev. 1961), quoted with approval in *United States* v. *Bryan*, 339 U. S. 323, 331 (1950).

tional protection" is struck, its pendulum will rest on the "use plus fruits" immunity standard rather than on a wastefully broader transactional immunity. The preemptory right of the people to every man's evidence should not be derogated from any further, by its various exceptions, than is necessary to achieve the variegated ends justifying the exceptions. Thus, the rules defining the scope of the exceptions should be formed with a just deference to the vital need of society in general for relevant evidence. As Mr. Justice White stated in his concurring opinion in *Murphy* v. *Waterfront Commission, supra* at 93-94:

> "Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies. See *Blair* v. *United States*, 250 U. S. 273, 39 S. Ct. 468, 63 L. Ed. 979. Such testimony constitutes one of the Government's primary sources of information. The privilege against self-incrimination, safeguarding a complex of significant values, represents a broad exception to governmental power to compel the testimony of the citizenry."

It follows that any rule enunciating the scope of the privilege against self-incrimination should allow for the garnering of a maximum amount of information consistent with the values and policies of the exception itself. It is respectfully submitted that the instant "use plus fruits" immunity statute will better achieve this end than the transactional immunity standard urged by appellant. Under the former standard a person is immunized with re-

spect to testimony he gives plus any evidence flowing directly or indirectly therefrom. Therefore, the more testimony a witness gives under this immunity, the greater will be his protection from possible future prosecution based upon the testimony and evidence he gives. Thus, the amount of protection a person can secure is directly proportional to the amount of testimony and accompanying details he gives under the grant of "use plus fruits" immunity. The incentive to give more information then results in greater protection for the individual and in greater amounts of useful information for the state. But, this result is not achieved under a grant of transactional immunity. Under the latter grant, a person need only adumbrate answers to the questions put to him and he still receives an absolute immunity "for or on account of any transaction matter or thing concerning which he may testify or produce evidence. . . ." Thus, the *incentive* to give complete and detailed responses to questions is stripped from a person testifying under such an immunity, because once having merely mentioned an area of possible criminal activity, he achieves all the protection he can possibly receive under the original immunity grant. Transactional immunity then, acts as an effective prophylactic to impede the governments efforts to secure the very information it so vitally needs to effectively operate. Nowhere is this need for access to information so acute as with commissions such as the State Commission of Investigation. The Commission is an essentially investigatory-legislative agency[26] with the duty to investigate over a broad area of public concern. The duties and powers of the Commission are expansively set forth in N.J.S.A. 52:9M-2:

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[26] *In re Zicarelli*, 55 N. J. 249, 256-261 (1970).

> The commission shall have the duty and power to conduct investigations in connection with:
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> a. The faithful execution and effective enforcement of the laws of the state, with particular reference but not limited to organized crime and racketeering;
>
> b. The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;
>
> c. Any matter concerning the public peace, public safety and public justice.

After this broad mandate, the commission is given additional duties under N.J.S.A. 52:9M-3:

> At the direction of the governor or by concurrent resolution of the legislature the commission shall conduct investigations and otherwise assist in connection with:
>
> a. The removal of public officers by the governor;
>
> b. The making of recommendations by the governor to any other person or body, with respect to the removal of public officers;
>
> c. The making of recommendations by the governor to the legislature with respect to changes in or additions to existing provisions of law required for the more effective enforcement of the law.

These duties make it as clear as anything can be that the Commission's efficacy in achieving its statutorily-prescribed goals is inextricably connected with its ability to secure a maximum amount of information during the course of its activities. Subsection (c) above mandates

the making of recommendations "for the more effective enforcement of the law", an area of obviously paramount governmental interest. Yet it is difficult to conceive of a more Sisyphean task for the commission to undertake than for it to have to essay to make recommendations for possible future legislation based on incomplete or insufficient information. This unacceptable situation is precisely what a transactional immunity standards tends to generate, at least in so far as it tends to truncate the amount of relevant information a person will give by undermining the incentive to give it. Moreover, the probity of the information given will be greater under the instant "use plus fruits" immunity standard than under transactional immunity. This is so because the risk of prosecution for perjury, a risk a witness runs under either immunity configuration, is increased when a greater amount of information is given, because the state then has more possible avenues of exploration to ferret out perjured testimony. And since, for reasons previously mentioned, a person testifying under a "use plus fruits" immunity has a greater incentive to give more information than one testifying under transactional immunity, it follows that the former will have to be more solicitous in protecting himself against prosecution for perjury, by giving trustworthy information so as to avoid a greater hazard of such prosecution. The converse of this analysis, of course, is that the less information a person must give, the less chance he has of being prosecuted for perjury. This is because the state does not have as much information to parse to determine whether perjury has been committed. And, as it has already been demonstrated that the incentive to give testimony is not as great under transactional immunity as it is under "use plus fruits" immunity, information secured under the broader immunity grant will tend to be less trustworthy and thus less probative

than similar information given under the instant "use plus fruits" immunity statute.

Further, the State Commission of Investigation will not be able as well to fulfill the important role it serves in the State of New Jersey[27] under the broader grant of immunity. Since the commission is investigatory, it is absolutely necessary that it receive the utmost cooperation and assistance from local and state agencies. Recognizing this need, the New Jersey Legislature wisely passed N.J.S.A. 52:9M-14 which provides:

> The commission may request and shall receive from every department, division, board, bureau, commission, authority or other agency created by the state, or to which the state is a party, or of any political subdivision, thereof, cooperation and assistance in the performance of its duties.

To date, the Commission has received the enthusiastic support of the divers agencies across the state of New Jersey and has in its turn cooperated to the fullest with the latter. Such agencies have been able in large measure, to cooperate with the assurance that their own ongoing investigations and possible prosecutions based thereon would not be jeopardized by immunity grants given by

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[27] The concept of statewide organized crime investigating and prosecuting units has been unstintingly endorsed by the President of the United States, who realizes the efficacy of such units in combating organized crime throughout the nation. In his message on "Organized Crime", Doc. No. 91-105, House of Representatives, 91st Cong., 1st sess. (1969), The President spoke of the concerted Federal, State and Local efforts needed to combat this menace and pledged $300,000,000.00 in federal funds, most of which was to go to the states, in block grants to deal with problems of law enforcement. *Ibid.*, at 2-3.

the Commission. They were secure in the knowledge that if their own efforts were untainted, and their cases or proceedings built on "independent evidence", they could cooperate without fear of endangering said proceedings. This cooperative interchange of information and relative security vis a vis pending proceedings, has helped to bring about a climate wherein major legislative and executive break-throughs in the sensitive but frustrating area of dealing effectively with organized crime and racketeering[28] have been attained. But this climate of cooperation threatens to be severely undetermined, if not totally destroyed by the imposition of a transactional immunity standard. The alacrity with which cooperation and assistance is given to and by the Commission surely must ebb if heretofore cooperating agencies know that any such exchanges with the commission may one day, and unforeseeably, culminate in the loss of otherwise proper prosecutions because information given to them was given under a grant of transactional immunity. The tocsin would assuredly be sounded for an abrupt halt to any such future, and formerly salutory, exchanges by the agencies that feared the merciless lash of transactional immunity. The consequences of this development might not unreasonably be expected to be a severe incursion into the effectiveness of state law enforcement in general, not only with respect to New Jersey or to appellee Commission. "After all . . ." as Mr. Justice White said in his concurring opinion in *Murphy, supra* at 96, ". . . the States still bear primary responsibility in the country for the administration of the criminal law." The portentous cloud of transactional immunity in this situation thus threatens to engulf with-

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[28] See generally, *New Jersey State Commission of Investigation First Annual Report* (1970) and *New Jersey State Commission of Investigation 1970 Annual Report* (1971).

in its penumbra, the efficiency of legitimate state and local law enforcement activities throughout the states by cutting off important and heretofore accessible sources of information at a time when more effective tools are needed by the States to carry their heavy onus of responsibility in the law enforcement area. By contrast, the instant "use plus fruits" immunity statute undertakes to adopt what Mr. Justice Holmes defined as the "exchange theory" in *Heike* v. *United States*, 227 U. S. 131 (1914). This theory holds that, in as much as immunity statutes are enacted in reaction to the Fifth Amendment, it is necessary only that the immunity granted be co-extensive with the quid pro quo for which it was granted. They need not go further. And to the extent that a transactional immunity standard goes beyond this and offers an absolute defense to prosecution, it is not an "exchange" but rather a "gratuity to crime". 227 U. S. at 142. The exchange theory embodied in the instant statute strikes a more reasonable balance between the individual rights and the interests of the government by avoiding the "gratuity" trappings of transactional immunity and thus encouraging cooperation among state and local agencies in the area of law enforcement.

There are other compelling reasons why the "use plus fruits" immunity standard should be upheld. For example, the Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[29] A possible conflict arises between the Fifth and Sixth Amendments when an accused standing trial calls a witness in his favor who refuses to testify on his behalf on the basis of the Fifth Amendment privilege against self-

[29] U. S. Const. Amendment VI.

incrimination. This conflict was recognized in terms of powers and duties of the government by Mr. Justice White, concurring in *Murphy* v. *Waterfront Commission*, 378 U.S. at 94 n. 1:

> The power and corresponding duty are recognized in the Sixth Amendment's commands that defendants be confronted with witnesses and that they have the right to subpoena witnesses on their own behalf. The duty was recognized by the first Congress in the Judiciary Act of 1789, which made provision for the compulsion of attendance of witnesses in the federal courts. 1 Stat. 73, 88 (1789). See also Lilienthal, The Power of Governmental Agencies to Compel Testimony, 39 Harv. L. Rev. 694-695 (1926); 8 Wigmore, Evidence, §§ 2190-2193 (McNaughton rev., 1961).

Since the Sixth Amendment right to compulsory process in its sphere of operation is as important a safeguard to the accused as the Fifth Amendment privilege against self-incrimination is in its own baliwick, one right should not be given precedence over the other. One way of alleviating the friction generated in the above situation would be to grant a subpoenaed witness an immunity in exchange for his testimony. Although this solution to the problem seems to resolve the tension between the two constitutional rights, it has been rejected in several cases. In *Earl* v. *United States*, 361 F. 2d 531 (C.A.D.C. 1966), the court held *inter alia*, per Burger Circuit Judge, that although the government might have granted a discharged codefendant immunity and required him to testify, the governments refusal to do so did not deny defendant a fair trial. But the court noted at 361 F. 2d at 534 n. 1:

> We might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process. Arguments could be advanced that in the particular case the Government could not use the immunity statute for its advantage unless Congress made the same mechanism available to the accused.

Thus, the court at least tacitly acknowledged a situation where a defendant may very well be entitled to the immunized testimony of a witness on his favor. The same court declined to disturb this holding in *Morrison* v. *United States*, 365 F. 2d 521 (C.A.D.C., 1966) where again defendant tried, but failed to get an immunity order for his witness. But the *Earl* court conceded that the Congress could provide for such a procedure i.e. giving a defendant a right comparable to the government to compel testimony, and obliquely suggested that the argument had some merit 36[illegible] F. 2d at 534, 535. To the extent that the suggestion does have merit, the question then becomes what type of immunity would the Congress be amenable to passing to afford a defendant this additional protection. It is respectfully submitted that a "use plus fruits" immunity would best achieve this end because the government would not run the risk of jeopardizing future prosecutions which they had already developed. This hazard of losing possible cases against witnesses compelled to testify under a grant of transactional immunity on behalf of a defendant is more than obvious. It is an ineluctable conclusion. Thus, while the Government would

stand to lose too much if it had to grant transactional immunity in exchange for testimony on behalf of a defendant, without this protection, innocent persons might lose valuable testimony on their behalf from third persons who would not testify without being given immunity. Congress would certainly be reluctant to provide this succor if transactional immunity were necessary on the same theory, i.e. that the cost to the government in terms of losing possible prosecutions would be too high a price to pay for the extra protection it gave defendants. However, the instant "use plus fruits" immunity standard relieves a major portion of these objections. By providing such a statute, the government need not give up prosecutions, based on independently secured evidence, against witnesses testifying on behalf of defendants. And the amount of testimony obtainable and the probity of that testimony would both be greater under the "use plus fruits" standard than under the transactional standard.[30] Indeed, in a recent incident, the son of a well known judge was arrested in a trailer home, along with other youths for possession of marijuana. In fact, the judge's son had arrived at the trailer just minutes before the police entered the premises, seized the drugs and arrested the occupants. Although the case against the judges son was subsequently dismissed, if he had gone to trial and had wanted to secure the testimony of the owner of the trailer (who knew the judge's son had no knowledge of the drugs found by the police and who was himself prosecuted and convicted of the offense charged) to corroborate his assertion that he had no knowledge of the existence of the marijuana and that he had arrived only moments before

[30] See Appellee's Brief, *supra* at 57-58; 60-61 where these points are discussed at some length.

the police, the government's decision to grant a prospective defendant immunity or not would be greatly influenced by the scope of the immunity necessary. It seems clear that the government, in these circumstances, could not afford to grant transactional immunity. For by doing so, it would have to pardon a possible culpable party against whom it had a strong case, to allow the judge's son to secure testimony which he claimed would exonerate him. Under the circumstances, the government would have proper justification in denying the judge's son the best evidence available to exculpate him i.e. the testimony of a defendant. This Hobson's choice is avoided entirely if the government can grant the defendant a "use plus fruits" immunity similar to the instant statute. Under such a grant, the defendant-witness could relieve the judge's son of involvement by answering responsively that the latter arrived shortly before police and was not involved in the incident. This testimony would not have been a total bar from prosecution; defendant might have been prosecuted for the same offense on the basis of evidence independent of his testimony. Thus, it is patent that "use plus fruits" immunity is the more practical configuration to solve this otherwise difficult dilemma and bests achieves the individual-state balance necessary to adjust the demands of society and the constitutional rights afforded its citizens.

Like considerations apply in the area of the Sixth Amendment "Confrontation" clause, which states that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[31] Thus, in *State* v. *Nelson*, 72 Wash. Dec. 2d 269, 432 P. 2d

[31] U. S. Const. Amendment VI.

857 (1967), defendant was charged with murder in the first degree. At his trial, the state called John Thomas Patrick Jr., an alleged accomplice, to testify. In response to 28 questions asked by the prosecutor regarding the night of the homicide, Patrick asserted the privilege against self-incrimination. Defendant appealed his subsequent conviction, contending that the prosecution denied him his Sixth Amendment right to confrontation when it repeatedly forced the witness to claim the privilege against self-incrimination in the presence of the jury. A divided Washington Supreme Court reversed and remanded. *Held*: The witness' refusal to answer gave rise to incriminating inferences not subject to cross-examination, thus abridging defendant's right to confrontation under the Sixth Amendment. The government, in the *Nelson* case, could easily have avoided the issue in that case if it had granted the witness immunity from use of his testimony, or its fruits. By doing so, the defendnat would have had the opportunity to cross-examine the immunized witness, and the entire issue of "confrontation" would never have arisen. Similar considerations control the analysis of the scope of immunity necessary to best serve the interests of the parties in the "confrontation" area of the Sixth Amendment as in the "compulsory process" area of that same amendment. Under a "use plus fruits" immunity the government would not have to give up prosecution entirely in order to compel the witness' testimony; it could still have prosecuted him on evidence secured independently of his testimony. This of course would mean that the government itself would be a good deal less reluctant to grant such immunity to witnesses in its favor than it would if it had to relinquish any possibility of prosecution whatsoever, as it would be forced to do under a grant of transactional immunity. This in turn means more efficient and effective

law enforcement. Further, the amount of testimony the government would receive from such a witness as well as the trustworthiness of that testimony would, as shown in earlier parts of this brief,[32] be greater. Finally, the defendant would not have been deprived of the cherished constitutional right to confrontation, and so much of the appeal based upon the violation of that right would never have been before the court.

Additional practical arguments in favor of "use plus fruits" immunity can be marshalled in the area of regulation and taxation of illicit or highly suspect activities by federal and state government. As has previously been seen,[33] in proceedings involving deficiency assessments[34] taxes on wagering,[35] and failure to register or possession of unregistered firearms,"[36] all areas brought with potential hazards of self-incrimination for those who fall within the class of persons required to register or pay taxes, this court has been urged to place restrictions on the use of the information thus obtained by Federal and State authorities. And this court has consistently asserted that "the suggestion is . . . in principle an attractive and apparently practical resolution of the difficult problems before us." *Marchetti* v. *United States,* 390 U. S at 58. When confronted with the alternate suggestion that prose-

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[32] See N. 30, *supra.*

[33] Appellee's Brief, at 39-40.

[34] *United States* v. *Blue,* 384 U. S. 251 (1966).

[35] *Marchetti* v. *United States,* 390 U. S. 39 (1968); *Grosso* v. *United States,* 390 U. S. 62 (1968).

[36] *Haynes* v. *United States,* 390 U. S. 85 (1968).

cution be barred absolutely in regard to criminal matters touching such information gathered, the court maintained in *United States* v. *Blue*, 384 U. S. at 255:

> "Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book."

Implicit within the courts statement is the fact that while a coterminous exchange of immunity is practically, socially and constitutionally necessary to protect the Fifth Amendment right of the individual, *Counselman* v. *Hitchcock, supra, Murphy* v. *Waterfront Commission, supra,* the immunity proffered should not offer "a gratuity to crime." Holmes, J., *Heike* v. *United States, supra,* at 142, by granting a protection, ". . . wastefully broader than the privilege." 8 Wigmore, Evidence 8, 2283 at 525, (McNaughton rev. 1961), quoted with approval by White, J., *Murphy*; *supra* at 107 (concurring opinion). This "intolerable degree of interference with the public interest" is precisely what the "use plus fruits" theory avoids by creating a milieau in which abundant and probative information may be gleaned from persons granted immunity, who in turn receive protection fully commensurate with the right taken from them, and with a minimum interference with law enforcement prerogatives. This type of knowledge is especially critical in the area of national regulatory schemes, those which, as in the examples adduced above, involve a substantial hazard of self-incrimination to the persons affected. A broad transactional standard would at once

deter rather than encourage the federal government from entering these important areas, and at the same time discourage cooperation between federal agencies and between federal and state agencies. First, because of the possibly competing rationales precipitating enactment of regulatory schemes such as are seen in *Marchetti, supra, Grasso, supra,* and *Haynes, supra,* to wit, on the one hand, the need for revenue and/or pertinent information and, on the other hand, a combined desire to keep tabs on criminals, limit their illegal activities and especially help bring them to book, the government is put to a choice under the broader grant, as to which set of competing values it wishes to give priority. If the answer is revenue or information, then if forced to grant transactional immunity in their regulatory plans, the federal or state government must relinquish to some extent, the competing value of bringing criminals to justice. If they consider relinquishment of the latter too high a price to pay for information and/or revenue, then they are forced to pay that price at the inevitable expense of the people. It is respectfully submitted that one area should not have to prosper at the sufferance of the other; both are vitally important to the government and thus to the people. And both ends can be achieved by the imposition of use restrictions on information obtained under these regulatory plans. Next, the transactional standard will have the same inhibiting effect on cooperation among federal agencies as it was shown to have on various state agencies.[37] And as shown before,[38] the "use plus fruits" immunity standard will substantially arrest these inhibitions and provide the atmosphere whereby cooperation and assistance among federal and state agen-

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[37] Appellee's Brief, *supra* at 61 thru 63.

[38] *Ibid.*

cies is encouraged rather than impeded. It is thus apparent that the only a "use plus fruit" immunity can achieve all these beneficial ends while at the same time affording as complete protection as is necessary and desirable under the Fifth Amendment. And it is equally manifest that transactional immunity fails to achieve them.

Apart from the above considerations, there are many preeminent and thoughtful persons, often of high station within federal and state government as well as many eminent law professors, attorneys, and others who have carefully weighed and analyzed the practical, social and constitutional ramifications of the Fifth Amendment and who have strongly endorsed "use plus fruits" immunity. For example, the National Committee on Reform of Federal Criminal Laws[39] was established in November of 1966 by the Congress to undertake a study of the Federal Criminal laws and to recommend improvements.[40] Among the im-

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[39] 18 U.S.C. prec. § 1 note, Pub. L. 89-801, Nov. 8, 1966, 80 Stat. 1516.

[40] Section 2 of the National Commission provides for the membership of the Commission:

> "The Commission shall be composed of—
>
> '(1) three Members of the Senate appointed by the President of the Senate,
>
> '(2) three Members of the House of Representatives appointed by the Speaker of the House of Representatives,
>
> '(3) three members appointed by the President of the United States, one of whom he shall designate as Chairman,

(*Footnote continued on following page*)

portant topics the National Commission considered for revision were the Federal witness immunity laws. In a statement made before the Senate Subcommittee on Criminal Laws and Procedures[41] Congressman Poff, Vice Chairman of the National Commission stated:

(Footnote continued from preceding page)

"(4) one United States circuit judge and two United States district judges appointed by the Chief Justice of the United States.' "

The actual members appointed are as follows:

"HON. EDMUND G. BROWN of California, *Chairman*

Congressman RICHARD H. POFF of Virginia, *Vice Chairman*

U. S. Circuit Judge George C. Edwards, Jr. of Michigan

Senator Sam J. Ervin, Jr. of North Carolina

U. S. District Judge A. Leon Higginbotham, Jr. of Penna.

Senator Roman L. Hruska of Nebraska

Congressman Robert W. Kastenmeier of Wisconsin

U. S. District Judge Thomas J. MacBride of California

Senator John L. McClellan of Arkansas

Congressman Abner J. Mikva of Illinois

Donald Scott Thomas, Esq. of Texas

Theodore Voorhees, Esq. of Dist. Col.

U. S. Circuit Judge James M. Carter of California and Congressman Don Edwards of California served as members of the Commission from its inception until December 1967 and October 1969, respectively."

[41] *Hearings on Measures Related to Organized Crime*, 91st Cong., 1st Sess. at 280-287 (1969).

> ". . ., we the Commission came to the conclusion that the grant of immunity to be exchanged for the privilege against self-incrimination—as is also recognized in title II of S.30, now pending before the committee—need not and should not be a defense as such but only a ground for suppressing the use that is the key word 'use'—of evidence, similar to the exclusionary rule which is now applied to evidence assembled in violation of various constitutional rights." [42]

The basic conclusion was subsequently endorsed by both the Senate and House Judiciary Committees, the President of the United States in a special message to Congress,[43] and ultimately by the Congress itself.[44] Moreover, the

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[42] *Ibid.*, at 281. For a thorough and most excellent elaboration on the scope of immunity question, see Professor Robert G. Dixon, Jr.'s prepared statement in the instant *Hearings*, ibid., at 290-327. Professor Dixon, a Professor of Law at George Washington University Law Center strongly favors the "use plus fruits" immunity standard.

[43] *Message from The President of the United States to the Congress of the United States, Relevant to the Fight Against Organized Crime*, April 23, 1969; *Hearings on Measures Related to Oranized Crime, supra* at 444, 448.

[44] The Organized Crime Control Act of 1970, Pub. L. 91-452, Title II, § 201 (a), Oct. 15, 1970, 84 Stat. 926, 18 U.S.C. §6001 *et seq.*

18 U.S.C. § 6002 provides, in pertinent part:

> ". . . the witness may not refuse to comply . . . on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, ..."

The similarity between this provision and the instant immunity statute of N.J.S.A. 52:9M-17 is readily apparent.

House of Representatives reported out an immunity bill[45] substantially similiar to immunity proposed by the National Commission and the Senate Judiciary Committee prior to the passage of the Organized Crime Control Act of 1970. This support for "use plus fruits" immunity, comes from men cloaked in the greatest public trust in our country, i.e. elected officials and judges, as well as persons of eminence from the private sector of our country such as law professors, lawyers, and other concerned individuals,[46]

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[45] H. R. Rep. No. 91-1188, 91st Cong., 2d Sess. (1970).

[46] Others actively involved in the National Commission on Reform of Federal Criminal Laws are,

"ADVISORY COMMITTEE

HON. TOM C. CLARK, *Chairman*
Maj. Gen. Charles L. Decker
Hon. Brian P. Gettings (from Oct. 1969)
Hon. Patricia Roberts Harris
Fred B. Helms, Esq.
Hon. Byron O. House (to Sept. 1969)
Hon. Howard R. Leary
Robert M. Morgenthau, Esq.
Dean Louis H. Pollak
Cecil F. Poole, Esq.
Milton G. Rector
Hon. Elliot L. Richardson (to Apr. 1969)
Gus Tyler (to Nov. 1969)
Prof. James Vorenberg
William F. Walsh, Esq.

STAFF

LOUIS B. SCHWARTZ, Director
RICHARD A. GREEN, Deputy Director
John W. Dean, III, Associate Director (to Feb. 1969)

(*Footnote continued on following page*)

whose opinions and points of view should merit the closest scrutiny and be accorded great respect because of their

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(Footnote continued from preceding page)

David P. Bancroft, Associate Director (from Dec. 1969)
Burton C. Agata, Senior Counsel
Milton M. Stein, Senior Counsel
Nancy M. Clarkson, Counsel
Lee Cross, Counsel
Thomas F. Hogan, Counsel
Daniel J. Pochoda, Counsel
John A. Terry, Counsel

Consultants

Gerald H. Abrams, Professor at Rutgers Univ., Law School (Camden) (Proof and Presumptions).
Norman Abrams, Professor at U.C.L.A. School of Law (Federal Jurisdiction; Assimilated Offenses; Fugitive Felon Act).
Burton C. Agata, Professor at Univ. of Houston Law School (Obstruction of Justice).
Paul Bender, Professor at Univ. of Pennsylvania Law School (Obscenity Controls).
G. Robert Blakey, Professor at Notre Dame Law School; Chief Counsel to the Subcommittee on Criminal Laws and Procedures of the U. S. Senate Judiciary Committee (Conspiracy and Organized Crime).
Robert G. Dixon, Jr., Professor at George Washington Univ. Law School (Immunity; Civil Rights and Elections).
Steven Duke, Professor at Yale Law School (Protecting Federal Revenues).
Ronald L. Goldfarb, Practicing Attorney, Washington, D.C. (Contempt).
Joseph Goldstein, Professor at Yale Law School (Riots).
Peter W. Low, Professor at Univ. of Virginia School of Law (Sentencing; Theft; Forgery and Other Fraudulent Practices).
Robert G. Morvillo, Practicing Attorney, New York, N. Y. (Gambling)."

sincere interest in the welfare of the country and its citizens. The study, scholarship and careful thought that went into the conclusions reached by this ensemble of highly respected individuals indicates the thoroughness and diligence with which they pursued their task. It can only be said that their opinions must lend great weight in support of the constitutional sufficiency and practical efficacy of "use plus fruits" immunity.

Finally, the instant statute enhances respectability for law while the broader transactional standard derogates from that respectability. Under the transactional immunity standard, the government is forced into the inconsistent posture of declaring certain activities unlawful i.e. subject to condemnation, on the one hand, and then inconsistently granting a perpetrator of that activity a full pardon with respect to the commission of the offense once he testifies under the immunity. This places the offender in the same position after the commission of the offense that he would be in had he never committed the offense at all. But this is trading with the devil, because if an act is condemnable *before* immunity is granted, then it must be condemnable *after* the grant of immunity. Thus, the government is forced, in effect, to fabricate vis à vis the relationship that an individual bears to the committed offense before and after a grant of immunity. Once the Rubicon is crossed, and certain actions are condemned, there should be no retreat by later removing the condemnatory nature of the deed. However, the "use plus fruits" immunity standard is not subject to this criticism. What the government labels unlawful, i.e. condemnable remains so both before and after a grant of "use of fruits" immunity. The only trade the government makes is an even exchange—a person's testimony for the government's assurance that it will not be used directly or indirectly

against him in any subsequent prosecution. Thus, the effect of the trade is not a complete pardon, because the witness can still be prosecuted on the basis of independent evidence. Rather it is a fundamentally fair barter, which enhances respect for law precisely because the law is being fair. And the average juror is bound to find testimony given under "use plus fruits" immunity more credible than that given under a transactional standard, because of the greater measure of trust he can repose in the basically fairer rule which extracted the testimony.

For all the above reasons, it is respectfully submitted that the instant "use plus fruits" immunity concept best reflects the values and policies the Fifth Amendment and supplies the best practical reason for adoption of this standard.

POINT II

The requirement of "responsive" answers to questions put under a grant of immunity does not violate Fourteenth Amendment due process.

N.J.S.A. 52:9M-17 requires that any grant of immunity conferred by the commission be "responsive". Our research reveals that New York has a like provision in a new Grand Jury immunity statute, Proposed New York Criminal Procedure Law §190.40 (effective Sept. 1, 1971). The New York statute reads in pertinent part:

2. A witness who gives evidence in a grand jury proceeding receives immunity unless:

(b) Such evidence is not *responsive* to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not responsive.

Appellant contends that this "condition" either on its face or as interpreted by the court below violates the "void-for-vagueness" doctrine of the Fourteenth Amendment Due Process Clause, and that therefore the ruling on this point by the Court below was in error. *In re Zicarelli*, 55 N.J. 249, 270 (1970).

It is respectfully submitted that due process is not violated by the requirement for responsive answers, that appellant misapprehends the nature of the "condition" imposed by the term responsive, that the lower court ruling was not in error, and that the decisions of this Court and other authorities so clearly uphold the constitutionality of this very language, as to negative appellant's contrary contention.

First, the "condition" which the term responsive imposes upon the answering requirement is not, as appellant would suggest, a method of government chicanery or subterfuge. The term does not blandish or lull a witness into giving answers which are not demanded by the questions. As the court said in *In re Zicarelli*, ibid., at 270:

> "The limitation is intended to prevent a witness from seeking undue protection by volunteering what the state already knows or will likely come upon without the witness's aid. The purpose is not to trap. Fairly construed, the statute protects the witness against answers and evidence *he in good faith believed were demanded.* (Emphasis added)

A fair reading of this language indicates appellant's confusion with respect to its intended purport. The emphasized language is read by appellant as meaning that the witness is protected from "use against him of answers

and evidence given in 'good faith.' *Appellant's Brief,* at 31, and that accordingly "the Court subsequently called upon to determine whether an answer was responsive would have to judge the "good faith" of the witness at the time the answer was provided" *Appellant's Brief,* at 34. But this is not the thrust of the language. Under the lower court test, the Court is not called upon to determine the "good faith" of the *witness* at the time the answer was given, but rather the sufficiency of the *answer* given in response to the question put. The proper emphasis is, therefore, on the answer given vis à vis the answer demanded, an objective test, and not on the witness's personal "good faith" in giving the answer, a clearly more subjective test. Put another way, the State is interested not in character analysis or considerations of moral turpitude, but rather in pertinent information. This confusion has lead appellant astray in his reliance on *Sinclair* v. *United States,* 279 U.S. 263 (1929). For in that case appellant was held in contempt for failure to answer questions put to him by a Senate committee. The Court rejected his contention that his conviction should be reversed because he acted in good faith on the advice of competent counsel, and went on to say at 299:

> "The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt."

Here, as in *Sinclair, supra,* appellant confuses the notion of moral turpitude which is not in issue, with refusal to answer pertinent questions, which is the issue. Sufficiency of disclosure is discussed by Professor McNaughton, Wigmore, Evidence § 2282, p. 512 (McNaughton Rev. 1961). He states:

> "The question will also arise whether the witness has in his testimony made a disclosure such as entitles him to the immunity. This may depend somewhat upon the phrasing of the particular statute. But, so far as the general principle is not affected by particular statutory wordings, it should be necessary and sufficient (a) that the witness states something, not merely denies knowledge of any facts, (b) *that his statement is of facts asked for by the opponent, not of facts volunteered or irrelevantly interjected and* (c) that the disclosure tend to incriminate the witness as to the crime prosecution which ultimately puts the immunity in issue." (Emphasis added.)

The emphasized language is in accord with the discussion of this point by the Supreme Court of New Jersey. It is obvious that an answer which is either not called for at all, i.e. volunteered, or one which bears no relevance to or is not appropriate to the question put cannot be "responsive" as that term is plainly intended to mean within the instant immunity statute, and as interpreted by the lower court. Moreover, appellant's suggestion that the Court subsequently called upon to determine the sufficiency of the answer would have to judge the "good faith" of the witness at the time the answer was given, reflects an illusory apprehension, i.e. the fear that an appellate court will be called upon to determine, on the basis of a sterile record, the "good faith" of the *witness* in answering and, if finding none, to hold him in contempt. As has been shown however, the court does not parse the witness's motive in answering the questions, but rather it examines the sufficiency of the answers themselves in relation to the questions put. If the objection is to the relevancy of the questions put, which appellant

does not suggest, then he would be entitled to a prior ruling by the lower court on the relevancy questions put to him. As Judge Motley said in *In re the Grand Jury Testimony of Joanne Kinoy,* —— F. Supp. —— (D.S. S.D.N.Y. 1971): "If a witness is not sure whether or not a question is related to the subject matter of the order, he is entitled to a prior ruling from the court. Only after such a ruling and the witness' continued refusal to answer would the witness be subject to a citation for contempt." This is in full accord with the commission's customary procedure.

Perhaps the most obvious oversight appellant commits is failure to recognize the discussion of this problem in the leading case of *Hoffman* v. *United States*, 341 U.S. 470 (1951). In that case, the petitioner refused to answer questions which he felt might tend to incriminate him of a federal offense. The trial judge found no real and substantial danger of incrimination to petitioner and ordered him to answer. Petitioner refused to answer and was held in criminal contempt. In reversing the conviction, the court laid down the test for proper invocation of the privilege, and at 486 said:

> "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a *responsive* answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

Subsequently, this test of what is self-incriminatory was applied against the states thru the Fourteenth Amendment. *Malloy* v. *Hogan*, 378 U.S. 1, 12 (1964). Thus it is clear that the above test applies with as equal vigor against New Jersey and the Appellee as it does against

the Federal Government. It is respectfully submitted therefore, that this honorable Court has already answered the instant objection before it by defining "self-incriminating" in terms of injurious disclosures based upon *responsive* answers to questions put. It is difficult to imagine any clearer or more definitive support for the constitutionality of the term responsive included in the instant statute than the rule formulated by your Honors using that very term. Moreover, "answer" itself is defined in *Webster's International Dictionary* (2d Ed. unabridged 1951), as "something done or given in *response* to an appeal, request, or the like, in return for something else; the act of making *response* or of giving something in return for something else." In this sense, "responsive" does not condition or qualify "answer" as appellant intimates. Rather, the two concepts are compliments of one another. Responsive thus helps to define what a true "answer" is at first instance. Yet appellant does not, nor could he object to the use of the term "answer" in the instant statute. "Answer" is a term so commonly and universally understood that it must surely be cavil to charge it with being "so vague that men of common intelligence must necessarily guess as to its application . . ." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). Like considerations must therefore obtain when analyzing the word "responsive". Ultimately, of course, the determination as to whether a word or phrase is or is not so vague as to violate "due process" is a matter of fact for this Court to decide on the basis of how the particular word or phrase is understood by men of common intelligence. The many cases cited by appellant in support of his fanciful contention that the term responsive is overly vague are all wide of the mark in this case, because neither facially, nor as interpreted by the lower court or by this honorable Court in *Hoffman* v.

United States, supra, or as applied against the states in *Malloy, supra,* does the term responsive violate Fourteenth Amendment due process. It is therefore respectfully submitted that this contention is without merit.

POINT III

Fear of foreign prosecution is not relevant in determining the validity of a Fifth Amendment claim of self-incrimination. Further, even if fear of foreign prosecution is now relevant, appellant has demonstrated no real and substantial fear of foreign prosecution.

(1) Fear of foreign prosecution is not relevant in determining the validity of a Fifth Amendment claim of self-incrimination.

Appellant contends that fear of foreign prosecution is relevant in determining the validity of a Fifth Amendment claim of self-incrimination, and cites in support of that proposition, *Murphy* v. *Waterfront Commission of New York,* 378 U.S. 52 (1964), a case in which he recognizes "no such question was before the Court . . ." Appellant's Brief at 35-36. Appellant then contends that ". . . the Court could not have arrived at its specific holding otherwise." While there is language in the *Murphy* decision to support such analysis, there is also language and better reason to support the contrary position i.e. that foreign prosecution or prosecution outside the United States is not relevant in determining Fifth Amendment claims.

In the *Murphy* Court's analysis of the English cases dealing with this subject, much was made of the two par-

ticular reasons, which the Court understood as the basis for older rule, that fear of foreign prosecution was not relevant. These reasons were stated in *The King of Two Sicilies* v. *Willcox,* 1 Sim. (N.S.) 301, 61 Eng. Rep. 116 (1851):

> (1) "The impossibility of knowing, as a matter of law, to what cases the objection, when resting on the danger of incurring penal consequences in a foreign country, may extend . . ., id., at 331, 61 Eng. Rep., at 128; and (2) the fact that 'in such a case, in order to make the disclosure dangerous to the party who objects, it is essential that he should first quit the protection of our laws, and willfully go within the jurisdiction of the laws he has violated, ibid., 61 Eng. Rep., at 128." 378 U.S. at 60-61.

This rule was subsequently modified in *United States* v. *McRae,* L.R., 3 Ch. App. 79 (1867), a case involving suit by the United States in an English Court for an accounting and payment of moneys allegedly received by the defendant as agent for the Confederate States during the Civil War. Defendant refused to answer questions on the ground that to do so would subject him to penalties under the laws of the United States. The Lord Chancellor said in *McRae, supra,* that *King of Two Sicilies* (holding that "the rule of protection [against self-incrimination] is confined to what may tend to subject a party to penalties by our own laws . . ." 1 Sim. (N.S.), at 331, 61 Eng. Rep., at 128) had been "most correctly decided," L.R., 3 Ch. App., at 85, but that the general rule there laid down was unnecessarily broad. He declined to apply the rule in *McRea* on the ground that "the presumed ignorance of the Judge as to foreign law . . . [had been] completely re-

moved by the admitted statements upon the pleadings, in which the exact nature of the penalty or forfeiture incurred by the party objecting to answer is precisely stated . . ., L.R., 3 Ch. App., at 85, and the further ground that the property subject to a forfeiture was "within the power of the United States," id., at 87. See Mr. Justice Harlan's concurring opinion in *Murphy, supra* at 81-82 n.1.

The King of Two Sicilies and *McRae* are distinguishable upon the very grounds which the former primarily relied in reaching its holding. It thus appears that *McRae* did not overrule *King of Two Sicilies* on this point, but rather extended the general rule to apply in situations where there were real and substantial hazards of incrimination in a "foreign jurisdiction." The Court's opinion in *Murphy, supra* at 67, makes it abundantly clear how important these two factors were in its acceptance of the *McRae* rule:

> "Moreover, the two factors relied on by the English court in *King of the Two Sicilies* were wholly inapplicable to federal-state problems in this country. The first—'The impossibility of knowing, as matter of law, to what cases the [danger of incrimination] may extend * * *,' supra, at 60—has no force in our country where the federal and state courts take judicial notice of each other's law. The second—that 'in order to make the disclosure dangerous to the party who objects, it is essential that he should first quit the protection of our laws, and willfully go within the jurisdiction of the laws he has violated,' supra at 60-61—is equally inapplicable in our country where the witness is generally within 'the jurisdiction' of the State under whose law he claims danger of incrimination, and where, if he is not, the State may demand his extradition."

It thus appears that the *McRae* rule was adopted by the *Murphy* Court for the same reasons that *McRae* modified *King of Two Sicilies, supra,* i.e. because even though the latter case was "most correctly decided" in the circumstances the case presented, yet those circumstances were found not to apply to the United States, because of our concept of two independent sovereign governments within the same territorial framework. The Court's holding made no mention, as indeed it should not have, regarding what rule it thought obtained under facts similar to *King of Two Sicilies, supra,* e.g., the facts in the instant case on this point, because the resolution to that question was not properly before it. Thus, appellants statement that "it thus appears that this principle of law was accepted by the majority in *Murphy*" is at least open to serious doubt and probably incorrect.

This interpretation gains force upon examination of *In re Parker,* 411 F. 2d 1067 (10 Cir. 1969), cert. granted, judgment vacated as moot, *sub nom. Parker* v. *United States,* 397 U.S. 96 (1970). In that case the Court held that where a witness had been specifically granted immunity from both federal and state prosecution, the witness was not justified in refusing to answer questions on the ground that there was a danger of incrimination in Canada. In discussing *Murphy, supra,* Judge Lewis opined at 1070:

> "It is true that Mr. Justice Goldberg, writing for the majority in Murphy, supra, traced the history and importance of the privilege against self-incrimination and in so doing indicated approval of some early English cases where the privilege was thought applicable to a 'foreign jurisdiction' or 'country.' But the Justice's reference to such cases was simply by way of argumentative analogy to this na-

> tion's state-federal relationship and carries no further persuasion. The fifth amendment was intended to protect against self-incrimination for crimes committed against the United States and the several states but need not and should not be interpreted as applying to acts made criminal by the laws of a foreign nation. The ideology of some nations considers failure itself to be a crime and should provide punishment for the failure, apprehension or admission of a traitorous saboteur acting for such a nation within the United States. In such a case the words 'privilege against self-incrimination,' engraved in our history and law as they are, may turn sour when triggered by the law of a foreign nation."

It is respectfully submitted that this holding is thoroughly consistent with *Murphy,* and should be followed in the instant case.

Appellant finally alleges that "world-wide dissemination of information" and "the well-known cooperation of police authorities in many nations" creates for him a "very real fear of ultimate prosecution" in foreign nations for foreign crimes. This line of reasoning, *ad reductio absurdum,* pushes the conjectural limits of a sort of international federalism to a fetish, and as such should be rejected by the honorable Court.

(2) Appellant has demonstrated no real and substantial fear of foreign prosecution.

The test for fear of self-incrimination was stated in *The Queen* v. *Boyes,* 1 B. & S. 311 (1861). The Queen's Bench held:

> "that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things —not a danger of an imaginary and unsubstantial character having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. * * *" Ibid. at 330-331.

This test has been fastly adhered to in the United States. *Brown* v. *Walker*, 161 U.S. 591, 599-600, (1896), *Heike* v. *United States*, 227 U.S. 131, 144 (1913), and see discussion in *Murphy* v. *Waterfront Commission, supra* at 60-63, 67-68. Thus, the New Jersey Supreme Court was merely following established precedent when it said "the danger [of foreign prosecution] in the case before us is too imaginary and unsubstantial to sustain a refusal to answer." *In re Zicarelli*, 55 N.J. at 270, 261 A. 2d at 140.

Appellant's substantial fear of incrimination, it is said is based upon the allegation that in a series of articles published by what he calls a magazine of "worldwide circulation," *Life Magazine* branded him as the "foremost internationalist" among criminals. Appellant's Brief at 39. This real fear of prosecution is further buttressed, it is said, by this commission's willingness to stipulate at the hearing before the judge holding appellant in contempt, that appellant had been the "object of very extensive publicity referring to him . . . as an 'internationalist' in crime." (Appendix, at 65a, 66a). It is respectfully suggested that these dangers are, in the words of the New Jersey Supreme Court, "imaginary and unsubstantial," and that the possible dangers inherent in these allegations are "so improbable that no reasonable man would suffer it to influence his conduct." *The Queen* v. *Boyes, supra.*

It is incumbent upon appellant to show why these dangers he calls real and substantial are so. He has tried and failed to convince the committing judge and the highest state court of the substantiality of these claims, and these judgments should be given great respect by this Court. Appellant has made no showing, nor even has he claimed, that the Commission has disseminated any of the information obtained from him at executive hearing to state and federal law enforcement authorities. Such a claim would be frivolous at any rate, since appellant answered no questions put to him, save his name, and no questions whatever were asked referring directly to foreign criminal activity. Moreover, N.J.S.A. 52:9M-15 forbids disclosure of any such information under pain of law. It reads:

> Any person conducting or participating in any examination or investigation who shall disclose to any person other than the commission or an officer having the power to appoint one or more of the commissioners the name of any witness examined or any information obtained or given upon such examination or investigation, except as directed by the governor or commission, shall be adjudged a disorderly person.

And if it is objected to that this provision, coupled with others cited by appellant in the Commission's statute, *Appellant's Brief*, at 41, empowers the Commisison to disseminate such information, it need only be rejoined that this Commission, in fact, has not done so and no claim or showing to the contrary has been maintained. Thus, any fears which appellant has regarding foreign prosecution are nothing more than ephermal fantasies of an overly-stretched imagination, and must therefore be considered without merit by this Court.

Appellant's final argument is based upon his fear of prosecution in Canada, which in turn is predicated on fear of extradition to that country (*Treaties in Force*, (Department of State Publication 8567) (1971)) upon matters which appellant admits were not even broached by the Commission when it questioned appellant in executive hearing. *Appellant's Brief*, at 40. If the basis of this fear seems illusory, which it clearly is, it is even more fanciful when the corresponding rule against self-incrimination in force in Canada is examined. The *Canada Evidence Act*, R.S.C. 1952, c. 307, §5. states:

> (1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or or any person.
>
> (2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in the giving of such evidence. R.S., c 59, s.5.

While this statute is federal law in Canada, the procincial courts have held that the Provinces are bound by

it and therefore cannot abridge it by statute. *Sweezey* v. *Crystal Chemicals Ltd. and Clark*, 38 D.L.R. 2d 505 (1963). And the Supreme Court of Canada long ago adopted what is tantamount to a Canadian *Murphy* rule in *Prosko* v. *Rex*, 63 S.C.R. 226 (Sup. Ct. Can. 1926). In *Prosko*, the Court said that the fact that incriminating admissions were made in the United States would have no bearing, *per se*, on their admissibility in Canada. The test for admissibility is *voluntariness*. If the statement was *not* voluntary, but rather coerced or compelled, it could not be admitted in Canada. The Court stated, at 229-230:

> "It has long been established as a positive rule of English law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, . . . The principle is as old as Lord Hale." And see *Grant, Federalism and Self-Incrimination*, 5 U.C.L.A. L.Rev. 1, 10-11 (1958)

It thus appears that any fears which appellant has regarding possible prosecution in Canada based on statements given under an American grant of immunity are, apart from being imaginary, groundless. For it is clear that the Canadian authorities would be bound by their own rule against self-incrimination not to admit, in a Canadian Court, testimony compelled in a foreign nation. And since fear of prosecution in either Venezuela or the Dominican Republic is conceded to be non-existent by appellant *Appellant's Brief*, at 42-43, it is respectfully submitted that appellant's contention as to this point is without merit.

CONCLUSION

Wherefore, for all the foregoing reasons, appellee prays that N.J.S.A. 52:9M-17 be declared constitutional under the Fifth and Fourteenth Amendments and that the judgment of the court below be affirmed.

Respectfully submitted,

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